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No. 11878

United States
Circuit Court of Appeals
For the Ninth Circuit

JENNIE WUCHNER,

Appellant.

vs.

GEORGE T. GOGGIN, Trustee in Bankruptcy of
the ESTATE OF CHARLES E. HILL, Doing
Business as HILL MACHINE TOOLS,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

APR 27 1948

PAUL P. O'BRIEN,

CLERK

No. 11878

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

WILLIAM W. BEARMAN,
RAYMOND B. McCONLOGUE,
1680 N. Vine St.,
Hollywood 28, Calif.

For Appellee:

MARTIN GENDEL,
607 James Oviatt Bldg.,
617 S. Olive St.,
Los Angeles 14, Calif. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States for the
Southern District of California, Central
Division

No. 44347-W

In the Matter of
CHARLES E. HILL, Doing Business as HILL
MACHINE TOOLS,

Alleged Bankrupt.

INVOLUNTARY PETITION IN
BANKRUPTCY

To the Honorable Judges of the District Court of
the United States, Southern District of Cali-
fornia, Central Division:

Come now your petitioners, South Bay Daily
Breeze, Chet's Service Station and Herbert Al-
bright, and respectfully represent as follows:

I.

That Charles E. Hill is an individual doing busi-
ness at 732 North Pacific Avenue, Redondo Beach,
County of Los Angeles, State of California, under
the fictitious name of Hill Machine Tools, within
the above judicial district for a longer period of
the six months preceding the filing of this petition
than in any other judicial district.

II.

That said alleged bankrupt is an individual who
could become a bankrupt under Section 4 of the
Bankruptcy Act, and is not a Municipal, railroad,
insurance or banking corporation, or a building and
loan association. [2]

III.

That the nature of the business conducted by the alleged bankrupt is the operation of a machine shop.

IV.

That the said alleged bankrupt owes debts in an amount of more than \$1,000.00.

V.

That your petitioners are three of the creditors of the alleged bankrupt having provable claims against the alleged bankrupt, fixed as to liability and liquidated in amount, and in a total sum in excess of \$500.00, with no security for the same, your petitioners being unsecured general creditors; that the nature and amount of your petitioners' claims are as follows:

(a) That the alleged bankrupt is indebted to South Bay Daily Breeze on an open book account for services, in the sum of \$69.12;

(b) That the alleged bankrupt is indebted to Chet's Service Station for goods, wares and merchandise in the sum of \$215.13;

(c) That the alleged bankrupt is indebted to Herbert Albright for auditing services in the sum of \$240.00.

VI.

That within four months next preceding the filing of this petition, and while insolvent, the alleged bankrupt still being insolvent, the said alleged bankrupt committed an act of bankruptcy in that he

suffered and permitted an alleged creditor, Clifton A. Hix, to file suit in the Los Angeles Municipal Court in action No. 751312, and through this legal proceeding to obtain a lien upon his property by virtue of an attachment, and the said lien has not been vacated or discharged within thirty days from the date of the commencement thereof, and more than thirty days have elapsed and there is still a keeper in possession of the [3] physical property of the alleged bankrupt.

Wherefore your petitioners pray that service of this petition with a subpoena may be made upon said Charles E. Hill, doing business as Hill Machine Tools, as provided in the Act of Congress relating to bankruptcy, and that he may be adjudged a bankrupt within the purview of said Act.

Dated this 1st day of April, 1946.

SOUTH BAY DAILY BREEZE,

By /s/ J. F. MOORE,
Manager.

CHET'S SERVICE STATION,

By /s/ C. C. HARRINGTON,
Owner.

/s/ HERBERT ALBRIGHT,
Petitioning Creditors.

GENDEL AND SHERMAN,

By /s/ MARTIN GENDEL,
Attorneys for Petitioning
Creditors. [4]

Southern District of California,
State of California,
County of Los Angeles—ss.

J. F. Moore, being first duly sworn, deposes and says: That he is the B manager of South Bay Daily Breeze, one of the petitioning creditors in the above-entitled proceeding; that he has read the foregoing Involuntary Petition in Bankruptcy and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters that he believes it to be true.

/s/ J. F. MOORE.

Subscribed and sworn to before me this 3rd day of April, 1946.

/s/ GLENN W. WOOD,

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires Oct. 20, 1947.

Southern District of California,
State of California,
County of Los Angeles—ss.

C. C. Harrington, being first duly sworn, deposes and says: That he is the owner of Chet's Service Station, one of the petitioning creditors in the above-entitled proceeding; that he has read the foregoing Involuntary Petition in Bankruptcy and knows the contents thereof; that the same is true of his own knowledge except as to the matters

therein stated on his information and belief, and as to those matters that he believes it to be true.

/s/ C. C. HARRINGTON.

Subscribed and sworn to before me this 4th day of April, 1946.

/s/ J. F. MOORE,

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires April 2, 1949. [5]

Southern District of California,
State of California,
County of Los Angeles—ss.

Herbert Albright, being first duly sworn, deposes and says:

That he is one of the petitioning creditors in the above-entitled proceeding; that he has read the foregoing Involuntary Petition in Bankruptcy, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters that he believes it to be true.

/s/ HERBERT ALBRIGHT.

Subscribed and sworn to before me this 4th day of April, 1946.

/s/ J. F. MOORE,

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires April 2, 1949.

[Endorsed]: Filed April 5, 1946. [6]

[Title of District Court and Cause.]

ORDER OF GENERAL REFERENCE

At Los Angeles, California, in said district on the 5th day of April, 1946.

Whereas, a petition was filed in this court on the 5th day of April, 1946, against Charles E. Hill, dba Hill Machine Tools, alleged bankrupt above named, praying that he be adjudged bankrupt under the Act of Congress relating to bankruptcy, and good cause now appearing therefor;

It is ordered that the above-entitled proceeding be, and it hereby is, referred to Benno M. Brink, Esq., one of the referees in bankruptcy of this court, to take such further proceedings therein as are required and permitted by said Act, and that the said Charles E. Hill, dba Hill Machine Tools, shall henceforth attend before said referee and submit to such orders as may be made by him or by a judge of this court relating to said bankruptcy.

/s/ PAUL J. McCORMICK,
District Judge.

[Endorsed]: Filed April 5, 1946. [7]

[Title of District Court and Cause.]

ORDER OF ADJUDICATION

At Los Angeles, in said district, on the 1st day of May, 1946.

The petition of South Bay Daily Breeze, Chet's Service Station and Herbert Albright, filed on the 5th day of April, 1946, that Charles E. Hill, dba Hill Machine Tools, be adjudged a bankrupt under the Act of Congress relating to bankruptcy, having been heard and duly considered, and there being no opposition thereto;

It is adjudged that the said Charles E. Hill, dba Hill Machine Tools, is a bankrupt under the Act of Congress relating to bankruptcy.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

[Endorsed]: Filed May 2, 1946. [8]

In the District Court of the United States for
the Southern District of California, Central
Division

In Bankruptcy No. 44,347-W

In the Matter of

CHARLES E. Hill, dba HILL MACHINE
TOOLS,

Bankrupt.

Appearances:

William W. Bearman and G. T. Fowler, 306 Taft
Building, 1608 North Vine Street, Los Angeles 28,
California, HO-7271, Attorneys for Jennie Wuch-
ner, Petitioner on Review.

Martin Gendel, Suite 607 James Oviatt Building,
617 South Olive Street, Los Angeles 14, California,
Trinity 2346, Attorney for George T. Goggin,
Trustee.

Henry F. Poyet, 114 Pier Avenue, Hermosa
Beach, California, Redondo-8165, Attorney for Dora
Hill.

REFEREE'S CERTIFICATE ON PETITION
FOR REVIEW OF ORDER IN RE JENNIE
WUCHNER

To the Honorable Jacob Weinberger, Judge of the
Above-Entitled Court:

I, Benno M. Brink, one of the Referees in Bank-
ruptcy of the said Court, before whom the above-
entitled matter is pending, do hereby certify to the
following:

Within the time allowed by an appropriate order of your Referee, Jennie Wuchner, hereinafter called Wuchner, has filed her petition for the review of an order made by your Referee in the above-entitled matter on December 5, 1946, in which order your Referee determined the respective rights of the trustee in this matter and of the said Wuchner in and to certain real property which is here involved. [9]

The Proceedings

On or about June 5, 1945, the said Wuchner entered into an agreement for the sale of certain real property with the above-mentioned bankrupt. The purchase price of the said property was to be paid in certain installments. Thereafter, some of the said installments not having been paid, the said Wuchner commenced an action to quiet title in the Superior Court of the State of California in and for the County of Los Angeles against the said bankrupt and his wife, Dora Hill. Later, and while the said action was pending, an involuntary petition in bankruptcy was filed on April 5, 1946, against the said bankrupt. On May 1, 1946, an order of adjudication was entered on the said petition and, thereafter, George T. Goggin was duly appointed trustee in the matter.

On June 10, 1946, the trustee filed herein a petition for an order to show cause against Wuchner requiring her to appear and show cause why an order should not be entered decreeing the afore-said agreement of sale to be in full force and effect.

An order to show cause was issued on the said petition and set for hearing on June 19, 1946. On June 18, 1946, Wuchner filed an answer to the said petition. On July 3, 1946, with leave of Court, an amended petition was filed in the premises by the trustee and an order to show cause issued thereon, returnable July 17, 1946. On July 18, 1946, Wuchner filed her answer to the said amended petition.

A number of hearings were had and Wuchner first objected to the jurisdiction of the Bankruptcy Court to hear and determine the issues raised by the trustee's aforesaid amended petition upon the ground that, at the time of the commencement of this bankruptcy proceeding, the aforesaid quiet title action was pending in the Superior Court of the State of California and that said State Court therefore had exclusive jurisdiction in the premises. When your Referee overruled the said objection to jurisdiction, Wuchner, without waiving such objection, proceeded on the merits of the case and contended [10] that, at the time of the commencement of this bankruptcy proceeding, the bankrupt had lost all of his rights under the aforesaid agreement of sale by defaults thereunder.

After full and complete consideration of all of the evidence and the law in the matter, your Referee, on November 18, 1946, filed herein a memorandum in which he held that the said agreement of sale was in full force and effect and that the trustee in this proceeding was entitled to a conveyance of the property here involved upon payment of the balance of the purchase price. On December 5, 1946, your

Referee signed and filed his formal findings of fact, conclusions of law and order in the matter and it is from this order that this review is taken.

The Questions Presented

The questions presented by this review are set forth on pages 6 to 11, inclusive, of the aforesaid petition for review, but your Referee believes that the said questions may be summarized as follows:

1. Does the Bankruptcy Court have jurisdiction in the matter here involved in the light of the pendency in the State Court of the aforesaid quiet title action at the time of the commencement of this bankruptcy proceeding?

2. Was your Referee correct in holding that the agreement of sale here involved is still in full force and effect and that the trustee in this matter is entitled to a conveyance of the property here in question upon payment of the balance of the purchase price?

The Evidence

The evidence in this matter is contained in the transcripts of the proceedings had before your Referee on June 19, July 24, August 14, and November 1, 1946, which are going up with this [11] certificate.

Findings of Fact, Conclusions of Law and Order of the Referee

A true copy of the findings of fact, conclusions of law and order of your Referee in this matter is going up with this certificate.

Papers Submitted

I hand up for the information of the Court the following papers:

1. Petition for Order to Show Cause re Jennie Wuchner, filed June 10, 1946.

2. Order to Show Cause re Jennie Wuchner, filed June 10, 1946.

3. Answer of Jennie Wuchner, filed June 18, 1946.

4. Amended Petition for Order to Show Cause re Jennie Wuchner, filed July 3, 1946.

5. Order to Show Cause re Jennie Wuchner, filed July 3, 1946.

6. Answer of Jennie Wuchner to Amended Petition of Charles E. Hill, filed July 18, 1946.

7. Points and Authorities of Jennie Wuchner, filed July 24, 1946.

8. Additional Points and Authorities (After Hearing), filed November 13, 1946.

9. Memorandum in re Trustee vs. Wuchner, filed November 18, 1946.

10. Respondent's Objections to the Trustee's Proposed Findings of Fact, Conclusions of Law and Order re: Jennie Wuchner, filed December 2, 1946.

11. A true copy of Findings of Fact, Conclusions of Law and Order re Jennie Wuchner, filed December 5, 1946.

12. Petition for Review of Referee's Order of December 5, 1946, filed January 10, 1947. [12]

13. Reporter's transcript of proceedings of June 19, 1946.

14. Reporter's transcript of proceedings of July 24th and August 14th, 1946.

15. Reporter's transcript of proceedings of November 1, 1946.

16. The following exhibits:

Trustee's

1. Agreement for sale of real estate.
2. Notice with return registered receipt to to Charles E. Hill, signed by Mrs. Jennie Wuchner.
3. Copy of letter dated June 28, 1946, to Mrs. Jennie Wuchner from Martin Gendel with check for \$5,035.43 with notice to Trustee George T. Goggin, Martin Gendel and Charles E. Hill and Dora Hill.
4. Letter dated 2-14-46 to Mr. H. F. Poyet, signed Mrs. Jennie Wuchner, with letter of 2-11-46 to Mrs. Jennie Wuchner from H. F. Poyet, and escrow instructions.
5. Letter dated 2-11-46 re escrow No. 32 to Angelus Escrow Service Company signed Frank Bruno and Teddy Berg.

Wuchner's

1. Notice to Charles E. Hill dated 2-8-46, signed Mrs. Jennie Wuchner with return receipt.

Respectfully submitted this 24th day of January, 1947.

/s/ BENNO M. BRINK,

Referee in Bankruptcy.

[Endorsed]: Filed Jan. 24, 1947. [13]

[Title of District Court and Cause.]

AMENDED PETITION FOR ORDER TO
SHOW CAUSE RE JENNIE WUCHNER

To the Honorable Benno M. Brink, Referee in
Bankruptcy:

Comes now your petitioner, George T. Goggin,
and respectfully represents:

I.

That he is the duly elected, qualified and acting
trustee in bankruptcy in the within bankruptcy proceeding.

II.

That prior to the commencement of the within
bankruptcy proceeding the bankrupt herein, Charles
E. Hill, entered into a written agreement with one
Jennie Wuchner for the purchase from her of certain
real property and the improvements thereon
described as follows:

Lots 11, 12, 13, Block 173, of Redondo Beach,
in the City of Redondo Beach, County of Los
Angeles, State of California, as per map recorded
in Book 39, page 1 of Miscellaneous
Records of said County; [14]

That the purchase price of said property was
\$5,500, and that on or about the 11th day of February,
1946, the balance owing said Jennie Wuchner under
said contract was the sum of approximately \$4,912.63.

That said Charles E. Hill took possession of said real property under the terms of said sales contract upon the execution thereof, and on the 11th day of February, 1946, being then in possession of said real property, and the said contract for the purchase thereof being then in full force and effect and binding on both parties, the said Charles E. Hill did tender to the said Jennie Wuchner the full sum then owing on the purchase price of said real property, to-wit, the balance of \$4,912.63, and demanded of the said Jennie Wuchner a conveyance to him of said real property, in accordance with the terms of said sales contract; but the said Jennie Wuchner refused to accept said balance of said purchase price so tendered, or any part thereof, and refused to transfer title to said property to said Charles E. Hill, but instead wrongfully and without legal right, attempted to declare a forfeiture of said contract and the rights of the now bankrupt thereunder, and filed, under date of February 19, 1946, an action in the Superior Court of the State of California, in and for the County of Los Angeles, No. 510751, against the now bankrupt and his wife, entitled "Complaint to Quiet Title & Foreclosure of Purchasing Rights," whereby and wherein she apparently attempts to claim a forfeiture of said sales agreement and asserts that she is the owner of said property free and clear of any claims thereto by the bankrupt; that said action is now pending.

III.

That thereafter, on or about the 27th day of February, 1946, the bankrupt herein, Charles E. Hill, and his wife, Dora Hill, filed an action in the Superior Court of the State of California, in and for the County of Los Angeles, No. 511064, against Jennie Wuchner, et al, with reference to said sales agreement; that all the right, title and interest or claim of the said Dora Hill in and to said sales contract and real property covered thereby constitutes an asset of the within bankruptcy estate; that said complaint was entitled "Complaint for Declaratory Relief Under Section 1060 C. C. P." and is likewise predicated upon said sales contract above referred to; that said complaint asserts that the attempted forfeiture by Jennie Wuchner was unjustified and of no effect, and further alleges that the said Jennie Wuchner was motivated by bad faith and malice in attempting to declare a forfeiture against the bankrupt, and that the acts and conduct of the said Jennie Wuchner resulted in damage to the now bankrupt in the sum of \$20,000; that said action is now pending.

IV.

That your trustee, since the commencement of the within bankruptcy proceeding, has been in actual physical possession of the real property involved in said litigation, succeeding to the possession theretofore held by the bankrupt under said sales contract; that he is of the opinion, after examination of the facts and consultation with counsel, that the said Jen-

nie Wuchner is not entitled to clear title to said real property and that her attempted forfeiture was of no effect; that the issues determining title to said real property should be litigated before this Referee, particularly since the only steps taken in the State court have been filing of pleadings therein, and no actual trial has been had or other proceedings, in either of said Superior Court actions.

V.

That prior to the filing of the within amended petition your petitioner did legally tender to the said Jennie Wuchner all moneys which could possibly be claimed by her pursuant to the terms of said sales contract, being principal and interest due as [16] of February 5th, 1946, in accordance with the demand of the said Jennie Wuchner, in the sum of \$4,912.63, plus interest thereon at the rate of 6% per annum up to July 6th, 1946, in the sum of \$122.80, making a total tender of \$5,035.43; that prior to the filing of the within amended petition the said Jennie Wuchner did refuse and reject the said tender.

Wherefore your petitioner prays that this Court issue an order directing the said Jennie Wuchner and the said Dora Hill to appear and show cause, as follows:

1. Why the title to the real property described hereinabove should not be declared vested in the trustee, as an asset of the within bankruptcy estate,

free and clear of any claims by said Jennie Wuchner or said Dora Hill, upon the payment of the said sum of \$5,035.43;

2. Why said Jennie Wuchner and Dora Hill should not be restrained from proceeding with either of the above-entitled Superior Court actions, pending a determination by this Court of the issues now before it;

3. Why the determination of this Court should not be without prejudice to the rights of the trustee to sue in a proper court for such damages as this estate may be entitled to, if any, as a result of the acts and conduct of the said Jennie Wuchner;

4. Why this Court should not grant petitioner such other and further relief as may be proper.

Dated this 26th day of June, 1946.

/s/ GEORGE T. GOGGIN,
Trustee.

/s/ MARTIN GENDEL,
Attorney for Trustee. [17]

State of California,
County of Los Angeles—ss.

George T. Goggin, being by me first duly sworn, deposes and says: that he is the trustee in bankruptcy in the above-entitled action; that he has read the foregoing Amended Petition for Order to Show Cause Re Jennie Wuchner, and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ GEORGE T. GOGGIN.

Subscribed and sworn to before me this 26th day of June, 1946.

[Seal] /s/ ESTHER ANDERSON,
Notary Public in and for said County and State of
California.

[Endorsed]: Filed Jan. 24, 1947. Edmund L.
Smith, Clerk; By F. Betz, Deputy.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE
RE JENNIE WUCHNER

Upon reading and filing the amended verified petition of George T. Goggin, trustee in bankruptcy in the above-entitled matter, and good cause appearing therefrom, on motion of Martin Gendel, attorney for said trustee,

It Is Hereby Ordered that Jennie Wuchner and Dora Hill be and appear before the undersigned Referee, in his courtroom located on the 3rd floor of the Federal Building, Los Angeles, California, on the 17th day of July, 1946, at the hour 10 o'clock a.m., then and there to show cause why the prayer of said amended petition should not be granted.

It Is Further Ordered that service of this Order to Show Cause may be made upon the respondents above named as follows: on respondent Jennie Wuchner by mailing a copy thereof, with a copy of the amended petition upon which the same is based, to Messrs. William W. Bearman and G. T. Fowler, attorneys for said Jennie Wuchner, at their office address, to-wit, 1680 North Vine Street, Los Angeles 28, California; and on the respondent Dora Hill by [19] mailing a copy thereof, with a copy of the amended petition upon which the same is based, to Henry F. Poyet, Esq., attorney for said Dora Hill, at his office address, to-wit, 114 Pier Avenue, Hermosa Beach, California.

Dated this 3rd day of July, 1946.

/s/ BENNO M. BRINK,

Referee in Bankruptcy.

[Endorsed]: Filed Jan. 24, 1947. [20]

[Title of District Court and Cause.]

ANSWER OF JENNIE WUCHNER TO
AMENDED PETITION OF CHARLES E.
HILL

Comes Now, Jennie Wuchner, and respectfully represents as follows:

I.

Admits that George T. Goggin is the duly elected, qualified and acting Trustee in Bankruptcy in the within bankruptcy proceedings.

II.

Admits that prior to the commencement of the within bankruptcy proceeding the bankrupt herein, Charles E. Hill, entered into a written agreement with one Jennie Wuchner for the purchase from her of certain real property and the improvements thereon. Admits that the purchase price of said property was \$5500.00, but alleges that on the 8th day of February, 1946, the said Charles E. Hill, doing business as Hill Machine Tools, and Dora Hill, had no interest in the real property covered by said contract, or any rights under said contract, by reason of the fact that same had been cancelled [21] and terminated, save and except such moneys as were coming to the said Jennie Wuchner for taxes under said contract. Said Jennie Wuchner denies that the said contract was in full force and effect on the 11th day of February, 1946, and that the said Charles E. Hill tendered to the said Jennie Wuchner the amount of \$4,912.63, and denies that Jennie Wuchner refused to accept such amount, or

any part thereof, and denies that she refused to transfer title to said real property to said Charles E. Hill. Denies that she, without any legal right, attempted to declare a forfeiture of said contract and the rights of the bankrupt thereunder, but admits that she filed regularly under date of February 19, 1946, an action in the Superior Court of the State of California, in and for the County of Los Angeles, No. 511,075, against the now bankrupt and his wife, and that said action is now pending. And further, the said Jennie Wuchner sets out that in the above-entitled action a *Lis Pendens* was filed at the time said action was filed, covering the real property described in the petition and also in the action above referred to.

III.

Admits that on or about the 27th day of February, 1946, Charles E. Hill, the bankrupt herein, and his wife, Dora Hill, filed an action in the Superior Court of the State of California, in and for the County of Los Angeles, No. 511,064, against Jennie Wuchner, being an action for declaratory relief, in which action the defendant Jennie Wuchner has filed her verified answer to said complaint, and the said action is now pending.

IV.

Answering Paragraph IV of said petition, denies generally and specifically each and every allegation therein contained, and each and every part thereof.

For a Further, Separate and Distinct Affirmative Defense, the said Jennie Wuchner alleges: [22]

I.

That the Superior Court of the State of California, in and for the County of Los Angeles, having acquired jurisdiction of the subject matter and of the parties involved in the within proceeding by reason of the actions filed, which were filed prior to the time of the adjudication of bankruptcy of the said Charles E. Hill, said jurisdiction remains with the State Court for the trial of said matter and the final determination thereof; that the Bankruptcy Court has no jurisdiction of the within proceedings.

II.

Further answering said petition, the said Jennie Wuchner denies the right of the Referee in Bankruptcy to try and adjudicate in anywise title to the said real property and/or the subject matter covered therein, and/or the issues involved in actions of this character, by reason of the fact that the Referee in Bankruptcy is precluded from trying actions of this kind.

Wherefore, the said Jennie Wuchner prays that this Court do not issue an Order to Show Cause against her to determine in said Court by said Referee title to said real property and/or that title should be declared vested in the Trustee, and/or that said real property, and/or any rights therein, are assets of the bankrupt estate herein free and clear of any claim by said Jennie Wuchner; and that the petition of the said George T. Goggin, as Trustee in Bankruptcy be dismissed.

/s/ WILLIAM W. BEARMAN,

Attorney for Jennie Wuchner.

State of California,
County of Los Angeles—ss.

Jennie Wuchner, being by me first duly sworn, deposes and says: that she is the Respondent in the above-entitled action; that she has read the foregoing Answer and knows the contents thereof; and that the same is true of her own knowledge, except as to the matters which are therein stated upon her information or belief, and as to those matters that she believes it to be true.

/s/ JENNIE WUCHNER.

Subscribed and sworn to before me this 16th day of July, 1946.

[Seal] /s/ MEYER C. SOLOMON
Notary Public in and for Said County and State of California.

My Commission Expires Nov. 8, 1948.

[Affidavit of service by mail attached.]

[Endorsed]: Filed Jan. 24, 1947. [24]

[Title of District Court and Cause.]

MEMORANDUM IN RE TRUSTEE VS.
WUCHNER

On February 5, 1946, the respondent Wuchner exercised the right she had under the contract here involved and declared the whole amount of principal and interest under the contract immediately due and payable. By doing so, the said respondent waived the right under the contract, if any she then

had, to terminate the contract by reason of defaults then existing, if any existed, in the payment of installments under the contract.

Consequently, the notice of forfeiture and cancellation given by the said respondent on February 8, 1946, was wholly ineffective.

Under the contract, any default of the bankrupt in failing to pay the whole amount of the contract, as demanded by the said respondent, could not become effective for thirty days from the date of such demand. Within said thirty-day period, an offer of performance was made on behalf of the bankrupt. Any defect or irregularity in such offer, if any there were, was waived by the failure of the respondent to object thereto. It is clear, from the record in the [25] case, that at the time the said offer of performance was made, the bankrupt was able and willing to perform according to the offer. (*Backus v. Sessions* (1941) 17 Cal. (2d) 380.)

The conclusion is inescapable that the aforesaid offer of performance was in all respects good and sufficient. However, even if it were wholly ineffective, the fact remains that within the aforesaid thirty-day period after demand was made by the respondent for the payment of the whole of the principal and interest under the contract, the respondent unequivocally stated that the contract was forfeited and cancelled. This was a clear indication on her part that no offer of performance by or on behalf of the bankrupt would be considered by her and, consequently, no further offer of performance by the bankrupt was required or necessary.

The Referee concludes that the contract here in question is in full force and effect and that the trustee in bankruptcy, upon payment of the balance of the purchase price, is entitled to a conveyance of the property here involved, together with the policy of title insurance referred to in the contract.

Counsel for the trustee will prepare appropriate findings, conclusions and order and deposit the original and one copy thereof with the Referee and serve a copy thereof on counsel for the respondent, who may have the time prescribed by Rule 7 of this Court to submit his objections, if any he has thereto.

Dated: November 18, 1946.

BENNO M. BRINK,
Referee in Bankruptcy.

[Endorsed]: Filed Jan. 24, 1947. [26]

[Title of District Court and Cause.]

RESPONDENT'S OBJECTIONS TO THE
TRUSTEE'S PROPOSED FINDINGS OF
FACT, CONCLUSIONS OF LAW AND
ORDER RE: JENNIE WUCHNER

Comes Now the respondent, Jennie Wuchner, and respectfully submits her objections to the Trustee's proposed findings of fact, conclusions of law, and order re: Jennie Wuchner, as follows:

I.

The respondent respectfully submits that if the matters covered in the Trustee's Recital beginning

at line 17 on page 1, and ending at line 17, page 2 thereof, covers the findings as shown by the official records in this case, the same may stand without change, with this added finding: That at all times during this proceeding, as well as on the 14th day of August, 1944, respondent objects to the jurisdiction of the court upon the theory that pursuant to the cases laid down, a matter of this kind cannot be tried by a Referee in Bankruptcy upon an order to show cause and in a summary proceeding. [27]

II.

Referring to paragraph I of Trustee's Proposed Findings of Fact, beginning with line 22 and ending with line 29 on page 2 thereof, respondent has no objections to the matters set forth therein.

III.

Referring to paragraph II of Trustee's Proposed Findings beginning with line 18 on page three thereof the trustee sets out as follows: "* * * that no notice of default, nor any evidence of demand for payment were proven at the time of the hearing of this matter prior to the demand set forth * * *." Mrs. Hill testified that demands for payments were made upon her by Norman Wuchner for Jennie Wuchner but that her situation had changed and neither she nor Mr. Hill could keep up the payments or carry out the terms of the contract. The contract provides at line 30, page 3, that should default be made in payment of any installment when due, the

whole sum of principal and interest should become immediately due at the option of the seller. At line 10 it is agreed that time is the essence of this contract and in the event of failure to comply with the terms thereof by said buyer then the seller should be relieved from all obligations of law and equity to convey said property to the buyer and the buyer shall forfeit all rights thereto and to all money theretofore paid under this contract. Certain monthly defaults became effective thirty days from the date of said defaults and no notice, written or oral was required to be made by the respondent upon the buyer and when written demand was made for the total amount of the contract price and a termination of the contract by a latter notice, neither of these notices waived or excused buyer from the defaults for the monthly payments of October, November, and December, of 1945, and January, 1946, and by the very terms of the contract these defaults became absolute and gave respondent a right to cancel the contract. [28]

IV.

Referring to paragraph III of Trustee's Findings respondent does not understand the language and finds the same ambiguous and sets out with reference to the written notice of the 8th of February, 1946, that under the terms of the contract she was within her rights in taking such a position, and asks that it be stricken.

V.

Referring to paragraph IV of Trustee's proposed findings the respondent respectfully sets out that prior to a thirty-day period and less than thirty days from the exercising of said option by Jennie Wuchner, that the contract was cancelled and the said Charles A. Hill, through his attorney and agent in fact, to wit: Henry Poyet, Attorney at law and president of the Angeles Escrow office, submitted, in writing, a purported offer of payment of \$4,912.63; but it must be borne in mind that this being an action in equity, find the sworn testimony of Mr. Poyet of this matter disclosed that according to Mr. Poyet's own testimony, the escrow instructions that were introduced by the Trustee that there was \$4,912.63 for Jennie Wuchner there, was not true; that there was no money on deposit for her in this escrow and this coupled with the testimony of Mrs. Hill herself that their situation "had changed on account of the trouble her husband was in", that she was not able to carry out this contract. The evidence disclosed and the Findings should show that at the time of the alleged offer to perform the buyers were not ready, nor able, nor willing to perform the terms of the contract, but, on the contrary showed by their own testimony that there was no money on deposit for the sellers, anywhere, and showed an absolute inability on the part of the buyers to carry out the terms and conditions of the contract. Referring to the second paragraph under paragraph IV of Trustees proposed Findings, Jennie Wuchner

admits that after [29] cancelation of the contract by her, which she had a right to do, she did not accept a pretended offer, and it is disclosed that at the time this so-called offer was made, Jennie Wuchner was acting within her rights under the contract. Strike.

VI.

Referring to paragraph VI of Trustee's proposed Findings, respondent sets out that there should be eliminated therefrom that part of the paragraph beginning on line 6 with the word "apparently" and ending with the word "buyer" in line 7. Strike.

VII.

Referring to paragraph VII there was no evidence as to what the Trustee had discovered insofar as any equity in the bankrupt's estate is concerned although it is true that the Trustee sent a check of \$5,035.43 to the Respondent's attorney, which was refused, but this offer came months after the contract was terminated and the buyer was then in default and the defaults had become absolute and buyer had not complied with the terms of the contract. Strike paragraph VII as not warranted by the evidence. * * *

I.

Referring to paragraph I of Trustee's proposed Conclusions of Law, that is not a correct conclusion. The seller complied with the terms of the contract in giving the notice that she did and in

exercising the option that she did, and certain payments had become delinquent and in default under the terms of the contract and the rider attached to the contract. No other interpretation or conclusion would be right. To write into the contract a provision that does not exist there would be remaking a contract. By exercising her option Jennie Wuchner did not waive her right under the agreement of sale to terminate the agreement by reason of any defaults that might have existed arising from any non-payment of installments in the agreement of sale. To make such [30] a conclusion one would have to nullify the terms of the contract itself and make provisions in the contract that are not there. Strike all of this paragraph as not warranted by the evidence.

II.

Calling the Court's attention to paragraph IV, to be fair, the true evidence should be disclosed that although there was an admitted offer by the attorney, to-wit: Henry Poyet, it was not in accordance with the terms and conditions of said agreement of sale and the evidence disclosed that it could not meet the demand of the sellers. Unequivocally, the testimony showed that the buyer did not have the money and that there was no money of any kind available in the escrow, or elsewhere, and that the buyers did not have the ability, nor were they able or willing to comply with the terms of the contract but, on the contrary, the evidence strongly showed a contrary situation. Strike all of the allegations contained in this paragraph as not warranted by the evidence.

III.

Referring to paragraph V of Trustee's proposed Conclusions of Law, Jennie Wuchner admits that she sent certain notices, and made certain allegations, but same were all within the terms prescribed under the contract and there was nothing that she did wrongfully; that when she terminated the contract and exercised these rights, that she did same lawfully and pursuant to the contract and that the buyers failed to comply with the terms thereof. Strike all of this paragraph as not in conformity with the proof of facts, documentary or oral, and the law pertaining to the same. Strike paragraph VII of Conclusions as not warranted by evidence.

IV.

Referring to paragraph VI of Trustees proposed Conclusions of Law, strike all of said paragraph as not in conformity with the proof of facts, documentary or oral, and the law pertaining to the same. [31]

1.

Referring to paragraph II of Trustees Proposed Order, respondent asks that the entire paragraph, beginning with the words on line 8 "That George T. Goggin * * *" and ending on line 24 "* * * sale contained in Trustees's Exhibit No. 1.", be stricken on the ground that this is a legal conclusion not borne out by the evidence and there is no provision in the contract itself authorizing such an order, nor

is the trustee entitled to such an order by reason of any proof and/or evidence, documentary or otherwise, produced at the trial.

Respectfully submitted,

WILLIAM W. BEARMAN and
G. T. FOWLER

By /s/ WILLIAM W. BEARMAN,
Attorneys for Respondent.

[Affidavit of service by mail attached.]

[Endorsed]: Filed Jan. 24, 1947. [33]

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER RE JENNIE WUCH-
NER

Pursuant to an original, verified petition of George T. Goggin, trustee in bankruptcy in the above entitled matter, an order to show cause was duly issued thereon as against the respondents Jennie Wuchner and Dora Hill, wife of the bankrupt herein, concerning the rights of the trustee in the within proceedings to the ownership of certain real property, and the respondent Jennie Wuchner having filed an answer thereto, the order to show cause was duly heard before this court on the 19th day of June, 1946, at which time the respondent

Jennie Wuchner was represented by her counsel William W. Bearman and G. T. Fowler, the respondent Dora Hill was present and represented by her counsel Henry F. Poyet, and the trustee was represented by his counsel Martin Gendel, and the matter having been partially heard, an order was made permitting the trustee to file an amended petition for order to show cause, an amended order to show cause, prior to July 5, 1946, and, pursuant to the order of court, George T. Goggin, as trustee, filed a verified amended petition for an order to show cause and this court did then issue an order to show cause thereon directed to the respondents Jennie Wuchner and Dora Hill; [34] that said order predicated on the amended petition of the trustee was duly served upon the respondent Jennie Wuchner and the respondent Dora Hill, and, pursuant thereto, a hearing thereon was set for the 17th day of July, 1946, the respondents being represented by the counsel aforesaid. Said hearing was thereafter continued to the 24th day of July, 1946, at which time the respondent Jennie Wuchner filed an answer to the amended petition and made an objection to the jurisdiction of the Referee to hear the issues involved in the order to show cause. The matter was then duly continued to the 14th day of August, 1946, at which time the objections of Jennie Wuchner to the jurisdiction of the said court were overruled and the matter was thereupon continued to the 18th day of October, 1946, and, thereafter continued to the 1st day of November, 1946, at which time certain stipulations of fact were entered into

by and between the counsel aforementioned and oral and documentary evidence having been argued and submitted, and the respondent Jennie Wuchner having filed additional points and authorities, and the matter having been duly considered, and the undersigned Referee having made and filed a Memorandum dated November 18, 1946,

Now, Therefore:

FINDINGS OF FACT

The undersigned Referee hereby makes the following Findings of Fact:

I.

That George T. Goggin is the duly elected, qualified and acting trustee in the within bankruptcy proceedings; that Dora Hill is the wife of Charles E. Hill, the bankrupt in the within proceedings; that as against the said George T. Goggin, acting as trustee, the said Dora Hill, as wife of the bankrupt, has no right, title or interest in and to the real property and the issues involved in the within Order to Show Cause, and, further, that said George T. Goggin, as trustee, has succeeded to all of the rights of Charles E. Hill in and to the agreement for sale of real estate hereinafter referred to.

II.

That on or about the 5th day of June, 1945, the respondent Jennie Wuchner, as seller, and the bankrupt, Charles E. Hill, as buyer, entered into [35]

an agreement for the sale of real estate, wherein the buyer agreed to purchase all of that certain real property described as follows, to-wit:

Lots 11, 12, 13, Block 173, of Redondo Beach, in the city of Redondo Beach, county of Los Angeles, state of California, as per map recorded in Book 39, Page 1 of Miscellaneous Records of said County;

that said agreement has been introduced in evidence as the trustee's Exhibit No. 1; that pursuant to said agreement the bankrupt herein did take physical possession of said real property and did remain in physical possession thereof until George T. Goggin, as trustee, took over said physical possession on behalf of the within estate; that said agreement by the terms thereof provided for the making of certain payments, and it appears that \$349.38 was paid at the time of the execution of said agreement, and that thereafter only one or two of the installment payments provided for in said agreement were paid, and that the installment payments due and owing for the months of October, November and December, 1945, and January, 1946, were not made by the bankrupt herein in accordance with the provisions of the agreement; that no notices of default, nor any evidence of demand for payment were proven at the time of the hearing of this matter prior to the demand set forth in words and figures as contained in the trustee's Exhibit No. 2, being a written notice signed by respondent Jennie Wuchner and

dated February 5, 1946; that the said notice was served on the bankrupt herein, and upon the respondent Dora Hill, on or about February 6, 1946, and, after referring to the agreement for the sale of real estate, and the description thereof, and the fact that certain installment payments were then in default, contains the following language:

“ * * * the seller hereby exercises the Option contained therein and declares the whole amount of principal and interest now due and unpaid under said Agreement, namely, the sum of \$4,912.63 due, and hereby demands that you pay forthwith to the seller the said sum of \$4,912.63, being the principal and interest now due unpaid”; [36]

that the agreement of sale, dated June 5, 1945, being trustee's Exhibit No. 1, contains the express provision therein as follows:

“It is further agreed that any default shall not become effective for Thirty days (30) from date of said default.”

III.

That by written notice dated February 8, 1946, and contained in respondent Jennie Wuchner's Exhibit No. 1, the said Jennie Wuchner ignored the exercise of her option as aforementioned, and did not notify the bankrupt herein that, because of the default in the installment payments as provided for in the agreement, the said Jennie Wuchner declared the agreement forfeited and cancelled.

IV.

That within a reasonable time after the receipt of the option to declare the entire amount then due and owing, as set forth in 'Trustee's Exhibit No. 2, the bankrupt, Charles E. Hill, through his attorney and agent-in-fact, to-wit, Henry Poyet, and his wife, Dora Hill, and less than thirty days from the exercise of said option by Jennie Wuchner, did tender, in writing, as shown and set forth in 'Trustee's Exhibit No. 4, the sum of \$4,912.63; that pursuant to the terms of the agreement of sale, being Trustee's Exhibit No. 1, the receipt of these monies was contingent upon the seller providing the buyer with a Certificate of Title Policy, showing the property free and clear, and, in accordance with the terms of the agreement the said sum of \$4,912.63 was duly offered to Jennie Wuchner as the seller at a time when the offer could be performed in accordance with the terms and conditions thereof.

V.

That prior to the expiration of thirty days from the original exercising of the option by Jennie Wuchner to declare the entire amount due and payable, and pursuant to her attempted election to declare the agreement terminated and cancelled, as per Jennie Wuchner's Exhibit No. 1, the said Jennie Wuchner did again arbitrarily and unequivocally refuse to accept any offer of payment, and did so refuse without specifying any defect or irregularity in the offer to pay in full, as described hereinabove. [37]

VI.

That thereafter, and on or about the 19th day of February, 1946, the said Jennie Wuchner filed an action (numbered 510751) in the Superior Court of the State of California, in and for the County of Los Angeles, against the now bankrupt and his wife, Dora Hill, entitled "Complaint to Quiet Title & Foreclosure of Purchasing Rights", apparently attempting by said proceedings to retain the monies theretofore paid to her by the buyer, and to declare the agreement cancelled and free of any claims of the buyer; that by stipulation between counsel for said plaintiff and the defendants, no answer or other proceedings were filed or had in the said Superior Court action prior to the commencement of the within bankruptcy proceedings on or about the 5th day of April, 1946; that on or about the 27th day of February, 1946, an action was filed by the bankrupt and his wife in the Superior Court of the State of California, in and for the County of Los Angeles, and numbered 511064, against the respondent Jennie Wuchner, seeking declaratory relief to the extent that the agreement should not be declared forfeited, and also seeking damages against the respondent Jennie Wuchner; that in this superior court action, after a demurrer and other hearings on the pleadings, the defendant Jennie Wuchner filed an answer, and no further or other steps were taken in said superior court action prior to the commencement of the within bankruptcy proceedings.

VII.

That upon being elected as trustee in the within bankruptcy proceedings, and pursuant to the possession which he had taken of the real property involved, as receiver, the said George T. Goggin, in order to maintain the offer and tender theretofore made by Charles E. Hill, and in accordance with the document set forth in said Trustee's Exhibit No. 3, the said trustee did offer to pay the sum of \$5,035.43, which was stipulated to be all of the monies owing pursuant to the terms of the agreement as of July 6, 1946; the date of the offer and tender of payment by the trustee; that without objecting to the offer of payment and tender thereof in any manner as to any defect or irregularity [38] the said respondent Jennie Wuchner refused to accept the same and returned the monies to the trustee herein, and the said monies, evidenced by a check, have been deposited with this court along with the rejection thereof, as contained in Trustee's Exhibit No. 3.

VIII.

That it now appears that respondent Jennie Wuchner holds the legal title to the real property described above, free and clear of all incumbrances save and except covenants, conditions, restrictions, reservations, rights, rights of way, and/or easements of record, and the agreement for the sale of said property hereinbefore mentioned.

CONCLUSIONS OF LAW

From the above Findings of Fact, the undersigned Referee does make the following Conclusions of Law:

I.

That by not legally insisting upon the making of the regular monthly installment payments as provided for in the agreement of sale, contained in Trustee's Exhibit No. 1, the seller waived the provisions as to time being of the essence contained in said agreement, at least as to those payments existing prior to the notice of election of option dated February 5, 1946.

II.

That the agreement of sale contained in Trustee's Exhibit No. 1 gave to the seller an option to declare the entire balance of principal and interest then due and owing, providing the buyer did not make the installment payments as provided in said agreement; that on or about the 5th day of February, 1946, the seller effectively elected and exercised the said option and made a demand for \$4,912.63 as the amount then due and owing; that pursuant to the express provisions of said agreement the buyer had thirty (30) days from the date of the receipt of said notice on February 6, 1946, within which to comply with said demand of seller.

III.

That by so exercising her option, the said Jennie Wuchner, as seller, waived any right she might then have under the agreement of sale to [39] terminate the agreement by reason of any defaults that might then have existed arising from any non-payment of installments under the agreement of sale.

IV.

That pursuant to the demand of seller, and in accordance with the terms and conditions of said agreement of sale, the buyer made a proper offer, through his attorney and agents, with which offer he could then comply, tendering the sum of \$4,912.63, and thereby effectively meeting the demand of the seller as contained in the notice of February 5th; that contrary to the express terms of the agreement of sale and the demand of February 5th, the buyer wrongfully failed and refused to accept said offer, and the buyer is now entitled to the Grant Deed to the real property involved, and the Certificate of Title insuring the same, pursuant to the terms of said agreement of sale.

V.

That on or about February 8, 1946, the respondent, Jennie Wuchner, having prior thereto elected to exercise her option to declare the entire balance of principal and interest on the agreement to be due and owing, and before the thirty days had expired within which the buyer could comply with said

exercise of option and demand pursuant thereto, did wrongfully notify the buyer that the seller had terminated and cancelled the aforesaid agreement of sale, and did repeat this wrongful termination and cancellation by her return of the documents as contained in Trustee's Exhibit No. 4, being her letter of February 14, 1946, to the attorney for Charles E. Hill, that the aforesaid unequivocal indications by the seller that no offer of performance by or on behalf of the buyer would be considered by her, rendered it unnecessary for the buyer to thereafter make any further offer of performance.

VI.

That the trustee in bankruptcy having renewed the offer to pay the balance of principal and interest owing on the aforesaid agreement of sale, and having tendered the monies owing as of July 6, 1946, the maximum amount which could be payable to the said seller is determined to be the sum of the trustee's tender, to wit, \$5,035.43. [40]

ORDER

From the above Findings of Fact and Conclusions of Law, the undersigned Referee does hereby make the following order:

I.

That Dora Hill has no right, title or interest in and to the real property described herein, as against George T. Goggin as trustee in bankruptcy.

II.

That George T. Goggin, as trustee in the within bankruptcy proceeding, is the owner of the real property described as follows:

Lots 11, 12, 13, Block 173, of Redondo Beach, in the city of Redondo Beach, county of Los Angeles, State of California, as per map recorded in Book 39, Page 1 of Miscellaneous Records of said County,

free and clear of any claims of the respondent Jennie Wuchner; that upon payment of the sum of \$5,035.43 by the said trustee in bankruptcy to the respondent Jennie Wuchner, the said Jennie Wuchner is to immediately and concurrently therewith execute a Grant Deed to George T. Goggin as trustee in bankruptcy of the estate of Charles E. Hill, conveying the aforesaid real property free and clear of all incumbrances save and except covenants, conditions, restrictions, reservations, rights, rights of way, and/or easements of record, taxes to be prorated as of the 6th day of July, 1946, and, further, said Jennie Wuchner is ordered to furnish a policy of title insurance as specified in the agreement of sale contained in Trustee's Exhibit No. 1.

Dated: December 5, 1946.

BENNO M. BRINK,
Referee in Bankruptcy.

[Endorsed]: Filed Jan. 24, 1947. [41]

[Title of District Court and Cause.]

PETITION FOR REVIEW OF REFEREE'S
ORDER BY JUDGE

To the Honorable Benno M. Brink, Referee in
Bankruptcy and to the District Court of the
United States for the Southern District of Cali-
fornia, Central Division:

The petition of Jennie Wuchner respectfully rep-
resents:

1. Your petitioner is the Respondent who was
named in an original Order to Show Cause that
was heard before this Court on the 19th day of
June, 1946.

2. Your petitioner, Jennie Wuchner, having filed
an Answer to said Order to Show Cause, and same
was heard before the Referee in Bankruptcy on the
19th day of June, 1946, at which time the Respond-
ent Jennie Wuchner was represented by her counsel
William W. Bearman and G. T. Fowler, the re-
spondent Dora Hill was present and represented
by her counsel Henry F. Foyet, and the trustee was
represented by his counsel Martin Gendel, and the
matter having been [42] partially heard, an order
was made permitting the trustee to file an amended
petition for order to show cause, and an amended
order to show cause, prior to July 5, 1946, and,
pursuant to the order of the Court, George T. Gog-
gin, as Trustee, filed a verified amended petition
for an order to show cause, and this Court did
then issue an order to show cause thereon directed
to the Respondents Jennie Wuchner and Dora Hill;

that said order predicated on the amended petition of the trustee was duly served upon the Respondent Jennie Wuchner and the Respondent Dora Hill, and, pursuant thereto, a hearing thereon was set for the 17th day of July, 1946, the Respondents being represented by the counsel aforesaid. Said hearing was thereafter continued to the 24th day of July, 1946, at which time the Respondent Jennie Wuchner filed an answer to the amended petition and made an objection to the jurisdiction of the Referee to hear the issues involved in the order to show cause. The matter was then duly continued to the 14th day of August, 1946, at which time the Court overruled the objections of Jennie Wuchner, made from the outset of these proceedings to the jurisdiction of the said Court, and the matter was thereupon continued to the 18th day of October, 1946, and, thereafter continued to the 1st day of November, 1946.

The petitioner in said amended petition, George T. Goggin, as Trustee in Bankruptcy of the above estate, was permitted to, and did file his amended petition, as against Jennie Wuchner. This original petition and the amended petition prayed that title to certain real property that said Charles E. Hill had agreed to purchase as the Buyer and said Jennie Wuchner had agreed to sell as the Seller, which certain real property was located in the City of Redondo Beach, County of Los Angeles, State of California, described as follows:

Lots 11, 12 and 13, in Block 173, of Redondo Beach, in the City of Redondo Beach, County

of Los Angeles, State of California, as per map recorded in Book 39, Page 1, Miscellaneous Records of said County.

Subject To: Covenants, conditions, restrictions, reservations, rights, rights of way, and/or assessments, if any, of record.

should vest in the Trustee in Bankruptcy.

3. The said Jennie Wuchner had filed an answer to these proceedings, setting forth:

(a) That the Referee in Bankruptcy had no jurisdiction to try a matter involving title to real property in a summary proceeding. Your respondent respectfully called to the Court's attention the Points and Authorities of Jennie Wuchner filed in said case, as appears by the written Memorandum on file herein, citing amongst other cases

In re Black Bear Products Co.,
56 Fed. 2nd 243;

In re Seebold,
105 Fed. 910;

In re Greene-Halliday Co.,
(CC 2) 57 Fed. 175.

and see all of the other cases, and summary, as cited under the Points and Authorities filed with the Court by Jennie Wuchner on this matter, and the additional Points and Authorities, as appears in the Memorandum, and Authorities filed by Jennie Wuchner, entitled: Additional Points and Authorities After Hearing, and Petitioner respectfully requests that same shall be considered by this Honorable Court on this Petition for Review of Referee's Order.

4. That on the 18th day of November, 1946, the Honorable Benno M. Brink, Referee in Bankruptcy, filed his Memorandum designated In Re Trustee vs. Wuchner, as follows:

“In the Matter Charles E. Hill, dba Hill Machine Tools, Bankrupt. In Bankruptcy No. 44,347-W. Memorandum In Re Trustee vs. Wuchner. [44]

“On February 5, 1946, the respondent Wuchner exercised the right she had under the contract here involved and declared the whole amount of principal and interest under the contract immediately due and payable. By doing so, the said respondent waived the right under the contract, if any she then had, to terminate the contract by reason of defaults then existing, if any existed, in the payment of installments under the contract.

“Consequently, the notice of forfeiture and cancellation given by the said respondent on February 8, 1946, was wholly ineffective.

“Under the contract, any default of the bankrupt in failing to pay the whole amount of the contract, as demanded by the said respondent, could not become effective for thirty days from the date of such demand. Within said thirty-day period, an offer of performance was made on behalf of the bankrupt. Any defect or irregularity in such offer, if any there were, was waived by the failure of the respondent to object thereto. It is clear from the record in the case, that at the time the said offer of performance was made, the bankrupt was able and willing to perform according to the offer, (*Backus v. Sessions* (1941) Cal. (2d) 380).

“The conclusion is inescapable that the aforesaid offer of performance was in all respects good and sufficient. However, even if it were wholly ineffective, the fact remains that within the aforesaid thirty-day period after demand was made by the respondent for the payment of the whole of the principal and interest under the contract, the respondent unequivocally stated that the contract was forfeited and cancelled. This was a clear indication on her part that no offer of performance by or on behalf of the bankrupt would be considered by her and, consequently, no further offer of performance by the bankrupt was required or necessary.

“The Referee concludes that the contract here in question is [45] in full force and effect and that the trustee in bankruptcy, upon payment of the balance of the purchase price, is entitled to a conveyance of the property here involved, together with the policy of title insurance referred to in the contract.

“Counsel for the trustee will prepare appropriate findings, conclusions and order and deposit the original and one copy thereof with the Referee and serve a copy thereof on counsel for the respondent who may have the time prescribed by Rule 7 of this Court to submit his objections, if any he has thereto

“Dated: November 18, 1946.

“BENNO M. BRINK,

“Referee in Bankruptcy.”

And, later, after the submission of findings of fact, conclusions of law, and order in re Jennie Wuchner, submitted by the Trustee, the Referee eliminated from the findings of fact and conclusions of law, as follows:

“On Page 5, lines 24 to 26, I struck out the following words: ‘did ascertain that there was a substantial equity in and to the said real property above the balance then owing to the respondent Jennie Wuchner, and’,”

And added thereto, as follows:

“On Page 6, line 9, I added the following: ‘and the agreement for the sale of said property hereinbefore mentioned.’ ”

5. That the Referee in Bankruptcy, on the 5th day of December, 1946, made the following Order, reading as follows:

“ORDER

“From the above Findings of Fact and Conclusions of Law, the undersigned Referee does hereby make the following order:

“I.

“That Dora Hill has no right, title or interest in and to the real property described herein, as against George T. Goggin as trustee in bankruptcy.

“II.

“That George T. Goggin, as trustee in the within bankruptcy proceeding, is the owner of the real property described as follows:

“Lots 11, 12, 13, Block 173, of Redondo Beach in the city of Redondo Beach, County of Los Angeles, State of California, as per map recorded in Book 39, Page 1 of Miscellaneous Records of said County,

free and clear of any claims of the respondent Jennie Wuchner; that upon payment of the sum of \$5,035.43 by the said trustee in bankruptcy to the respondent Jennie Wuchner, the said Jennie Wuchner is to immediately and concurrently therewith execute a Grant Deed to George T. Goggin as trustee in bankruptcy of the estate of Charles E. Hill, conveying the aforesaid real property free and clear of all incumbrances save and except covenants, conditions, restrictions, reservations, rights, rights of way, and/or easements of record, taxes to be prorated as of the 6th day of July, 1946, and, further, said Jennie Wuchner is ordered to furnish a policy of title insurance as specified in the agreement of sale contained in Trustee's Exhibit No. 1.

“Dated, December 5th, 1945.

“BENNO M. BRINK,

“Referee in Bankruptcy.”

That said Memorandum in Re Trustee vs. Wuchner, and the Order hereinabove referred to, and the findings made by the Referee herein in the above matter, are contrary to the evidence, not supported by the evidence, and the findings and conclusions of law are illegal, unconstitutional, and improper, and not in accord with the facts and the law in this case.

The Respondent particularly sets out that the Referee erred:

1. In setting out that "On February 5, 1946, the respondent [47] Wuchner exercised the right she had under the contract here involved and declared the whole amount of principal and interest under the contract immediately due and payable. By doing so, the said respondent waived the right under the contract, if any she then had, to terminate the contract by reason of defaults then existing, if any existed, in the payment of installments under the contract."

2. In also setting out that by reason of same that "George T. Goggin, as trustee in the within bankruptcy proceeding, is the owner of the real property described as follows:

"Lots 11, 12, 13, Block 173, of Redondo Beach, in the City of Redondo Beach, County of Los Angeles, State of California, as per map recorded in Book 39, Page 1 of Miscellaneous Records of said County,

free and clear of any claims of the respondent Jennie Wuchner."

3. In the finding that "The notice of forfeiture and cancellation given by the said Respondent on February 8, 1946, was wholly ineffective.

4. In the finding and the order made thereunder that "Under the contract any default of the bankrupt in failing to pay the whole amount of the contract, as demanded by the said respondent, could

not become effective for thirty days from the date of such demand." This would read into the contract a provision that is not in same.

5. Further respondent cites as erroneous, and not in keeping with the facts in this case, as the transcript will show, that a proper offer of performance was made on behalf of the bankrupt and that any defect, or irregularity in such offer, if any there were, was waived by the failure of the respondent to object thereto. There was never any proper tender made at any time prior to the time that said contract was cancelled by the Seller, as she had a right to, for failure to comply thereto, and it is certainly not in keeping with what the testimony was that the record in the case, as shown at the time the said offer of performance was made, that the bankrupt was able and willing to perform according to the offer. An examination of the transcript and of the evidence will amply bear out that, at the time of the cancellation of the contract, said contract had a number of thirty-day installments that were in default, and these defaults became absolute; that there was a clear inability shown upon the part of the bankrupt to take care of any of these installments; that notwithstanding the notification to the respondent that there was certain moneys on deposit with an escrow company at Hermosa Beach, to take care of payments due, to the said Seller of said real property, who is the respondent in this case, that the records show, according to Mrs. Hill's testimony that her and her husband's situation had changed on account of serious difficulties that her husband

was involved in, that neither of them had the ability to take care of these payments, which were in absolute default on four thirty-day period payments, the defaults becoming absolute; that they were unable to take care of same, and that notwithstanding information conveyed by letter, by the then attorney for the said Hills, to the said Jennie Wuchner, that there was money on deposit in the escrow hereinabove referred to and/or in another escrow, that the evidence only shows one situation, and that is that in the first escrow, numbered 32, in the Hermosa Escrow Company, there was no moneys at all for the Wuchners, and in the second escrow there was no moneys on deposit for the said Wuchners; that there was no proper tender made at any time, or up to this time, to the Wuchners before the contract was cancelled.

6. The respondent further objects to the finding of the Referee and the Order based thereon that George T. Goggin, as Trustee in Bankruptcy, in the within bankruptcy proceedings, is the owner of said real property described as follows: [49]

“Lots 11, 12, 13, Block 173, of Redondo Beach in the City of Redondo Beach, County of Los Angeles, State of California, as per map recorded in Book 39, Page 1 of Miscellaneous Records of said County,

free and clear of any claims of the respondent Jennie Wuchner, that upon payment of the sum of \$5,035.43 by the said trustee in bankruptcy to the respondent Jennie Wuchner.”

7. The respondent further objects, as error, to the findings of the Referee on which he bases his order, that the Referee concludes that the contract herein in question is in full force and effect, and the Trustee in Bankruptcy, upon payment of the balance of the purchase price, is entitled to a conveyance of the property herein involved, etc. This would be making a new contract for the parties and would completely emasculate from said contract a provision that appears in this, as well as most real estate conditional contracts of sale, that time is of the essence of the contract; that upon the failure of the purchaser to comply with the terms thereof, and especially with the term of making payment, that the Seller shall be released from any obligations under said contract to convey title to said real property to the Buyer, and that any moneys paid under said contract shall be forfeited, as well as all other rights of the Buyer. The record is replete with a showing that there was absolute thirty-day effectual default periods, as well as defaults for the non-payment of taxes, but no proper tender was ever made for these payments prior to the cancellation, and, that therefore, the conclusion of the Referee, and the order based on same, setting out that the Purchaser, and/or his successor in interest, the Trustee in Bankruptcy, falls heir to a contract that is in full force and effect, and that, therefore, the Trustee in Bankruptcy, upon the payment of the balance of the purchase price, is entitled to a conveyance of the property herein involved, is wholly without [50] merit, legal, or otherwise, and not in keeping with the law and the facts in this case.

8. Jennie Wuchner, the Petitioner and Respondent, further objects to the Referee's finding and Order, hereinabove referred to, on the ground that the Court was wholly without authority to hear this particular cause, especially on a summary proceeding, for the reason that the District Courts, the United States Supreme Court, and, particularly, this United States District Court, in very recent decisions, has upheld the rule of law that the Court first obtaining jurisdiction over res retains it to the end, and that this rule prevails in bankruptcy, as well as in every other jurisdiction.

See cases cited by us in the Points and Authorities submitted before the Referee in Bankruptcy

In Re Greene-Halliday Co.,
(CCA 2) 57 Fed. (2nd) 173;

Priest vs. Weaver,
43 Fed (2nd) 57;

Pickens vs. Roy,
187 U. S. 177;

Eyster vs. Gaff,
91 U. S. 521.

Citing the case, with approval of
Greene-Halliday Co., *supra*;
Stratton vs. New,
283 U. S. 318.

See also,
Heath vs. Shaffer,
93 Fed. 647;
Linstroth vs. Ballew,
149 Fed. 960.

Upholding the doctrine that possession of res vests in the Court which first acquires jurisdiction with exclusive power to determine all controversies relating thereto. "Where the state suit is first this court has been in accord with others forbidding interference by the court of bankruptcy by summary proceedings."

See

In Re Greene-Halliday Co.,

57 Fed. 2nd 173;

Simons vs. Wells,

65 Fed. (2nd) 673;

Marcel vs. Engerbretson,

74 Fed. (2nd) 93-99.

The record will show that at the time the Referee in this matter attempted to exercise jurisdiction there was pending in the State Court a case filed by Jennie Wuchner, the Respondent [51] and Petitioner in this matter, which case was an action to quiet title to the real property in question here and to quiet the title of the said Jennie Wuchner to said property, same being the same property, and the same parties, as appears in these bankruptcy proceedings, save with the exception that a bankruptcy intervened before the matter was heard, and, as repeatedly held by the Federal Courts, where there is a bankruptcy, the construction and validity of a conditional contract of sale must be determined by the local laws of this State.

See

Bryant vs. Swofford Bros. D. G. Co.,

214 U. S. 279.

And where the State suit is first, this Court has been in accord with others forbidding interference by the Court of Bankruptcy by summary proceedings. Doctrine laid down in the cases previously cited, such as

Greene-Halliday Co.,

57 Fed. (2nd) 173;

Simons vs. Wells,

65 Fed. (2nd) 673;

Marcel vs. Engerbretson,

74 Fed. (2nd) 93-99;

Stratton vs. New,

283 U. S. 318.

Wherefore, your Petitioner prays:

1. For a review of said order by the Judge, and that said order be vacated and set aside; that the said Charles E. Hill dba Hill Machine Tools, and Dora Hill, and either of them, and/or George T. Goggin, as the Trustee in Bankruptcy of the said Charles E. Hill dba Hill Machine Tools, be held not to have any right, title, or interest in and to the real property described herein, as against Jennie Wuchner, the Respondent herein.

2. That Jennie Wuchner, the Respondent herein, who is also the Plaintiff in an action filed in the Superior Court for quiet title effecting said real property, by reason of the failure on the part of the Buyers therein to carry out the terms of said contract, be declared to be entitled to the rights that she seeks under said suit; that is, that her rights to ownership of said [52] property has not changed, and she is entitled to have said title quieted, as

against the claims of the Trustee herein and/or Charles E. Hill dba Hill Machine Tools, or any person claiming under either of the above-named parties, and that any moneys heretofore paid under said contract be declared, as provided for in said contract, forfeited, and the property of the said Jennie Wuchner, the Petitioner herein.

Your Petitioner respectfully again refers to the authorities submitted as hereinbefore set out by her, and respectfully asks that they be considered by the Judge of said United States Court before whom said Petition for Review shall be heard, and also respectfully asks that the Court, in reviewing the action of the Honorable Referee made in said matter, consider all of the papers, records, and exhibits filed in said matter, particularly the Answer of the said Jennie Wuchner to the Trustee's Order to Show Cause, Points and Authorities submitted by the said Jennie Wuchner before the hearing, and Additional Points and Authorities submitted after the hearing, as well as the entire record, including the Transcript of the proceedings taken before the Honorable Benno M. Brink at the various hearings in said matter.

Dated at Los Angeles, California, January 8th, 1947.

/s/ JENNIE WUCHNER,

Petitioner.

WILLIAM W. BEARMAN and
G. T. FOWLER,

By /s/ WILLIAM W. BEARMAN,
Attorneys for the Petitioner and Respondent, Jen-
nie Wuchner. [53]

State of California,
County of Los Angeles—ss.

I, Jennie Wuchner, the petitioner named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

/s/ JENNIE WUCHNER,
Petitioner.

Subscribed and sworn to before me this 8th day of January, 1947.

/s/ MEYER C. SOLOMON
Notary Public in and for the County of Los Angeles,
State of California. [54]

State of California,
County of Los Angeles—ss.

Jennie Wuchner, being by me first duly sworn, deposes and says: that she is the Petitioner in the above entitled action; that she has read the foregoing Petition for Review of Referee's Order by Judge and knows the contents thereof; and that the same is true of her own knowledge, except as to the matters which are therein stated upon her information or belief, and as to those matters that she believes it to be true.

/s/ JENNIE WUCHNER.

Subscribed and sworn to before me this 8th day of January, 1947.

[Seal] /s/ MEYER C. SOLOMON,
Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Filed Jan. 24, 1947. [55]

[Title of District Court and Cause.]

ORDER DENYING PETITION FOR REVIEW

A petition to review the order of the Referee dated December 5, 1946, was filed herein by Jennie Wuchner, a hearing was had on said petition, briefs were filed by counsel, and the matter was submitted to the Court for decision.

The Referee had jurisdiction to pass upon the question presented, and was correct in holding that the agreement of sale here involved is still in full force and effect and that the Trustee in this matter is entitled to a conveyance of the property upon payment of the balance of the purchase price.

This Court adopts the findings and conclusions of the Referee except that the portion of the finding Number Seven reading as follows:

“the said respondent Jennie Wuchner refused to accept the same and returned the monies to the Trustee herein, and the said monies evidenced by a check, have [56] been deposited with this court along with the rejection thereof as contained in Trustee’s Exhibit No. 3,”

is modified to read as follows:

“the said respondent Jennie Wuchner refused to accept the same and returned the check for said monies to the Trustee herein, and the said check has been filed with this court as contained in Trustee’s Exhibit No. 3.”

This Court adopts the Order of the Referee herein, except that the first sentence of Paragraph II, reading:

“That George T. Goggin as Trustee in the within bankruptcy proceeding, is the owner of the real property described as follows:”

is modified to read:

“That George T. Goggin as Trustee in the within bankruptcy proceeding is entitled to a conveyance of the real property described as follows:”

The Petition for Review is denied.

Dated this 16th day of December, 1947.

/s/ JACOB WEINBERGER,

United States District Judge.

Copies mailed to counsel 12/16/47.

Judgment entered and docketed Dec. 16, 1947, Book 47, Page 477. Edmund L. Smith, Clerk. By L. B. Figg, Deputy.

[Endorsed]: Filed Dec. 16, 1947. [57]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Jennie Wuchner, Respondent herein, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the Order Denying Petition for Review entered in this action by Jacob Weinberger, United States District Judge, on December 16, 1947.

/s/ WILLIAM W. BEARMAN,

/s/ RAYMOND B. McCONLOGUE,

Attorneys for Appellant.

Dated January 6th, 1948.

[Endorsed]: Filed Jan. 6, 1948. [58]

In the District Court of the United States for
the Southern District of California, Central
Division

No. 44,347

In the Matter of

CHARLES E. HILL, dba Hill Machine Tools,
Bankrupt,

JENNIE WUCHNER,

Appellant,

GEORGE T. GOGGIN, Trustee,

Appellee.

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

To the Clerk of the United States District Court for
the Southern District of California, Central
Division:

Jennie Wuchner, appellant herein, hereby designates the following portions of the record in the above entitled case to be certified to the Circuit Court of Appeals for the Ninth Circuit as the Record on Appeal:

1. Bankruptcy Petition—Order of Reference and Order adjudicating Charles E. Hill a bankrupt;
2. Amended Petition for Order to Show Cause re Jennie Wuchner, dated January 26, 1946.
3. Order to Show Cause re Jennie Wuchner, dated July 3, 1946.

4. Answer of Jennie Wuchner to amend the petition of George T. Goggin, Trustee of Bankrupt Estate of Chas. E. Hill. [59]

5. Reporter's Transcript of Hearing on Order to Show Cause by George T. Goggin, Trustee, vs. Jennie Wuchner, taken June 16, 1946.

6. Reporter's Transcript of hearing on Order to Show Cause by George T. Goggin, Trustee, vs. Jennie Wuchner, dated July 24, 1946, and August 14, 1946.

7. Reporter's Transcript of Hearing on Order to Show Cause by George T. Goggin vs. Jennie Wuchner, dated November 1, 1946.

8. Referee's Memorandum In re Trustee vs. Wuchner, dated November 18, 1946.

9. Respondent's objections to Trustee's Proposed Findings of Fact, Conclusions of Law and Order re Jennie Wuchner, filed December 2, 1946.

10. Findings of Fact, Conclusions of Law and Order re Jennie Wuchner, dated December 5, 1946.

11. Petition for Review of Referee's Order of December 5, 1946, filed January 10, 1947.

12. The following exhibits:

Trustee's Exhibits

(a) Agreement for sale of Real Estate.

(b) Notice with return registered receipt to Chas. E. Hill, signed by J. Wuchner.

(c) Copy of letter dated June 28, 1946, to Mrs. Jennie Wuchner, from Martin Gendel, with check in the amount of \$5,035.43, with notice

to Trustee, George T. Goggin, Martin Gendel, Chas. E. Hill and Dora Hill.

- (d) Letter dated February 14, 1946, to Mr. H. F. Poyet signed Mrs. Jennie Wuchner, with letter of February 11, 1946, to Mrs. Jennie Wuchner, signed by H. F. Poyet and escrow instructions. [60]
- (e) Letter dated February 11, 1946, regarding Escrow No. 32 to Angelus Escrow Service signed by Frank Bruno and Teddy Berg.

Wuchner's Exhibits

- (f) Notice to Chas. E. Hill dated February 8, 1946, signed Mrs. Jennie Wuchner with return receipt.

13. Order denying Petition for Review, dated December 16, 1947, signed Jacob Weinberger, United States District Judge.

14. Notice of Appeal filed January 6, 1948.

The points that will be relied upon by appellant on appeal are as follows:

1. That the Bankruptcy Court was without jurisdiction to try a matter determining title to real property in a summary proceeding, involving a stranger to the bankruptcy proceeding, while actions were pending in the State Court raising the same and other questions affecting the same property.

2. That the order of the Referee and the Findings of Fact and Conclusions of Law entered by him and the order of the United States District Judge confirming said order and Findings of Fact and Conclusions of Law are contrary to the evidence, not supported by the evidence and that said Findings of Fact and Conclusions of Law and said Order are illegal, unconstitutional and improper and not in accord with the law and facts in this case.

WILLIAM W. BEARMAN,
RAYMOND B. McCONLOGUE,
By /s/ RAYMOND B. McCONLOGUE,
Attorneys for Appellant.

[Affidavit of service by mail attached.]

[Endorsed]: Filed Feb. 10, 1948. [61]

[Title of District Court and Cause.]

CORRECTIONS TO DESIGNATION OF CON-
TENTS OF RECORD ON APPEAL

To the Clerk of the United States District Court,
for the Southern District of California, Central
Division:

George T. Goggin, Trustee, Appellee herein,
hereby designates corrections to the portions of the
record in the above entitled case as designated by

the Appellant in her designation of contents of record on appeal. Said corrections *our* underlined as follows:

1. Involuntary bankruptcy petition—order of reference and order adjudicating Charles E. Hill, a bankrupt.
2. Amended petition for order to show cause re Jennie Wuchner, dated July 3, 1946.
4. Answer of Jennie Wuchner to amended peti-tion of George T. Goggin, Trustee of Bankrupt estate of Chas. E. Hill; filed July 18, 1946.
5. Reporter's Transcript of Hearing on Order to Show Cause by George T. Goggin, Trustee, vs. Jennie Wuchner, taken June 19, 1946.

Trustee's Exhibits

- (b) Notice with return registered receipt to Chas. E. Hill, signed by Mrs. Jennie Wuchner.

Dated this 13th day of February, 1948.

/s/ MARTIN GENDEL,
Attorney for George T. Goggin, Trustee and
Appellee.

[Affidavit of service by mail attached.]

[Endorsed]: Filed Feb. 14, 1948. [64]

[Title of District Court and Cause.]

APPLICATION FOR ORDER TO CERTIFY
ORIGINAL EXHIBITS AND TRAN-
SCRIPTS TO CIRCUIT COURT OF
APPEALS

Comes now, Jennie Wuchner, appellant herein, and respectfully asks the Court under the provisions of Rule 75 "i" Rules of Civil Procedure, to allow the original exhibits and reporter's transcript of the evidence taken before the Referee herein be certified by the Clerk of the District Court to the Circuit Court of Appeals as the record in the above cause; that both the appellant and the appellee have copies of the transcript of the testimony taken before said Referee and also copies of the exhibits introduced as evidence at the hearings before said Referee; that it will only be necessary for the Clerk of the Circuit Court of Appeals to have printed a small portion of the transcript of the testimony taken before the Referee and that said original transcripts and original exhibits can be returned to the Clerk of this court as soon as the [66] record has been printed by the Clerk in the Circuit Court of Appeals.

WILLIAM W. BEARMAN and
RAYMOND B. McCONLOGUE.

By /s/ RAYMOND B. McCONLOGUE,
Attorneys for Appellant.

[Endorsed]: Filed Feb. 6, 1948.

[Title of District Court and Cause.]

ORDER

Now, on the 6th day of February, 1948, the application of the appellant for an order under Rule 75 "i." rules of Civil Procedure, to allow the original exhibits and reporter's transcripts of evidence be certified to the Circuit Court of Appeals, came on for hearing, and good cause having been shown therefor,

It is hereby ordered that the Clerk of the District Court certify the original exhibits and the original reporter's transcript of the evidence taken before the Referee to the Circuit Court of Appeals as the record of appeal in this case and that as soon as the Clerk of the Circuit Court of Appeals has printed the record on appeal, that said original transcripts and exhibits be returned to the Clerk of the District Court for the Southern District of California, Central Division.

Dated Feb. 6, 1948.

/s/ JACOB WEINBERGER,
Judge.

[Endorsed]: Filed Feb. 6, 1948. [68]

[Title of District Court and Cause.]

APPLICATION FOR ADDITIONAL TIME TO
FILE TRANSCRIPT OF RECORD AND
DOCKETING OF ACTION IN CIRCUIT
COURT OF APPEALS

Comes now, Jennie Wuchner, appellant herein and respectfully asks the court for additional time to file the Record and docket the above action in the Circuit Court of Appeals, and as grounds therefor shows the court as follows:

That the order of the United States District Judge from which this appeal was taken was entered on December 16, 1947; that notice of appeal was filed with the Clerk of the District Court on January 6, 1948; that appellants prepared and submitted to appellee an agreed "statement of the case" as provided by Rule 76 of Rules of Civil Procedure; that appellees refused to stipulate to said "agreed statement of the case"; that the time for certifying the record and docketing same in the Circuit Court of Appeals expires on [69] February 16, 1948.

Your appellant requests that said time be extended to March 15, 1948.

/s/ RAYMOND B. McCONLOGUE.
WILLIAM W. BEARMAN and
RAYMOND B. McCONLOGUE,
Attorneys for Appellant.

[Endorsed]: Filed Feb. 6, 1948. [70]

[Title of District Court and Cause.]

ORDER

The application of Jennie Wuchner, appellant, for an extension of time to file record and docket the above action in the Circuit Court of Appeals having been made and good cause therefor having been shown, the time for certifying the record in the above cause and docketing same in the Circuit Court of Appeals is hereby extended to March 15, 1948.

Dated Feb. 6, 1948.

/s/ JACOB WEINBERGER,

Judge, United States District
Court.

[Endorsed]: Filed Feb. 6, 1948. [71]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 71, inclusive, contain full, true and correct copies of Involuntary Petition in Bankruptcy; Order of General Reference; Order of Adjudication; Referee's Certificate on Petition for Review of Order in re Jennie Wuchner; Amended Petition for Order to Show Cause re Jennie Wuchner; Order to Show Cause re Jennie

Wuchner; Answer of Jennie Wuchner to Amended Petition of Charles E. Hill; Memorandum in re Trustee vs. Wuchner; Respondent's Objections to the Trustee's Proposed Findings of Fact. Conclusions of Law and Order re Jennie Wuchner; Findings of Fact, Conclusions of Law and Order re Jennie Wuchner; Petition for Review of Referee's Order by Judge; Order Denying Petition for Review; Notice of Appeal; Designation of Contents of Record on Appeal; Corrections to Designation of Contents of Record on Appeal; Application and Order to Certify Original Exhibits and Transcript and Application and Order Extending Time to Docket Appeal which, together with Original Trustee's Exhibits 1 to 5, inclusive and Original Wuchner Exhibit 1 and Original Reporter's Transcript of Proceedings on June 19, July 24, August 14 and November 1, 1946, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$18.70 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 3rd day of March. A.D. 1948.

[Seal]

EDMUND L. SMITH,

Clerk.

By THEODORE HOCKE,

Chief Deputy.

In the District Court of the United States for the
Southern District of California, Central Division

In Bankruptcy, No. 44,347-W

In the Matter of

CHARLES E. HILL, dba HILL MACHINE
TOOLS,

Bankrupt.

Before: Hon. Benno M. Brink,
Referee in Bankruptcy

REPORTER'S TRANSCRIPT OF HEARING
ON ORDER TO SHOW CAUSE BY
GEORGE T. GOGGIN, TRUSTEE, VER-
SUS JENNIE WUCHNER, JUNE 19, 1946

Appearances:

For the Trustee in Bankruptcy: Martin Gendel,
Esq., 607 James Oviatt Building, 617 South Olive
Street, Los Angeles 14, California.

For the Respondent Jennie Wuchner: William
W. Bearman, Esq., and G. T. Fowler, Esq., 306
Taft Building, 1680 North Vine Street, Hollywood
28, California.

For the Respondent Dora M. Hill and for Charles
E. Hill, the Bankrupt: Henry F. Poyet, Esq., 114
Pier Avenue, Hermosa Beach, California.

Los Angeles, California

Wednesday, June 19, 1946, 11 A.M.

The Referee: We will now take up the Hill
matter.

Mr. Gendel: In the Hill matter, the Court will
recall at the last hearing there was a problem as

to what would be done with reference to the position of the Trustee concerning the two Superior Court actions on file and the argument over the real property and one Jennie Wuchner. Since that time the Petition and Order to Show Cause filed and issued by the Court and served on the interested parties sets forth the position of the Trustee.

Mr. Bearman called me, said Mrs. Wuchner was a widow, eighty years of age and, in his opinion, unable physically to come to court and go through the rigors of examination in the court room. And I told him, so far as I was concerned, I would do everything I could to assist in taking the testimony in such a manner as to not jeopardize the health of Mrs. Wuchner.

That left us in the position where we knew we would not be ready to go ahead this morning with the Order to Show Cause. But we felt like we would like to present that problem to the Court and see whether the Court would have any suggestions.

We thought of two possibilities—one, take the testimony in the manner of a deposition; and I would go to her home. The other possibility would be to conduct a court hearing at her home and have the Court present, with a reporter, so that the Court could then observe the witness and hear the testimony.

The Referee: Let's settle first the question of jurisdiction.

Mr. Bearman: I think, your Honor, there is one question, and that is the question I want to state my position on. And that is there is a serious ques-

tion in my mind—and I am not prepared at this time to argue it—and that is the matter as to the jurisdiction.

This matter was started in the State Court, both the action to foreclose and then the action for declaratory relief. Irrespective of no answer having been filed in the action for foreclosure, when it was indicated to me there might be a Petition in Bankruptcy or something, I never took any default. I have not proceeded, even with the matter in such state, to take any default. And I want to state, without any restraining order, on account of my respects for this particular defendant and respects for myself, I will state, without orders, I will not proceed to do anything until it is determined just what procedure is to be followed.

The reason there is a serious question about jurisdiction is this. Without being a bankruptcy expert, I take it that the law with reference to matters of this kind is this: That where actions have been filed and are pending in the State Courts and a bankruptcy intervenes that if the Bankruptcy Court, that the Trustee in Bankruptcy comes in and takes title subject to the advantages and the disadvantages and disabilities, he steps into the shoes of the bankrupt as of the date—in other words, the State Court would have a right to proceed to follow up and carry out the procedure unless possession of certain properties came under the administration of the Bankruptcy Court.

As to whether or not there was possession in this case is a serious question. Frankly, our position

that we maintain is this: We had brought this action to foreclose on a conditional contract of sale. And, without arguing the equities here, we have an old lady here, about eighty years of age.

There is a default in payments, of a few payments. It is not like we are trying to grab somebody's property. That is not our position at all.

If this petitioner—and I say this without any reflection upon what has taken place—gets into very serious difficulty, is sentenced to San Quentin—they can't carry on the terms of that contract and declare it at an end, and we will attempt to show that. And then there is a question of increase in the real estate market, and whether or not there can be no moneys for creditors and for attorneys and what not. There is an attachment levied on this particular property. And, I think I am correct, I think I may say that the attaching creditor—and I say this without any reflection upon the gentleman who was the attorney, who formerly represented Mr. Hill, for his claim of seventeen hundred or eighteen hundred dollars for a balance of the fee.

We proceed, frankly, under our contract, which provides title shall not vest and also on the theory the contract has been terminated, to clarify the title, in so far as this old lady is concerned. That is all the question that is involved here and to carry out what the parties agreed among themselves and this contract which she could not carry on was at an end.

In view of this we filed our action. We served notices, using our procedure which has not only been regular, but within the law. Meanwhile there

is an action for declaratory relief filed by an attorney, and in addition, there being no answer to our action on the foreclosure, under which the attorney sets out that the rights as to the parties are unsettled and, among many other claims he makes, he also claims he is entitled to \$20,000 for damages for certain actions we took in not taking what they alleged to be a tender, all of which we deny.

Of course, I make this statement, and I think lawyers sometimes use a great many pages in pleading and use a lot of words, but I think Mr. Gendel, who is a very good lawyer, and he has not been able to figure out this question of damages. And, to my mind, I raise this query, as to how we could have damaged the bankrupt in this case for the sum of \$20,000 or any other amount, when the only asset that they claim as part of this estate, the only asset they claim as part of this estate, is the only thing that would furnish money, all around for everybody. The reason I say the question of jurisdiction is a very serious one is this: I don't admit, I would say this, that if the Trustee in Bankruptcy came in possession of certain properties, then I would have to say, if your Honor please, that the Bankruptcy Court would have a right to hear that matter and adjudicate its claims, whatever they may be. But if my position is sound, that even though a Receiver or a Trustee or an officer of the Bankruptcy Court, is in physical possession—I may be wrong on this statement—if he is there without any right and there is no legal title in the bankrupt,

then the fact that a Trustee is in physical possession of a property of which he has no title does not give jurisdiction and does not give possession to the Bankruptcy Court.

All I want to say is this, whether this matter is to be tried here or in the State Court, all we want is our day in court.

I might state very frankly the reason I am taking the position of not wanting to enter into any stipulations in this matter, with reference either to admitting jurisdiction of this Court or taking away any performed rights so far as my client is concerned, is this: Whatever your Honor should rule—and I make those very points, furthermore, as to jurisdiction—whether it is in this department or whether it is in the State Court, I shall abide by that and be willing to try out the issues, either here or in the State Court.

Frankly, I think the jurisdiction is in the State Court. But the statement Mr. Gendel also made, with reference to an old lady, I know this of my own knowledge, because I have gone there any time Mrs. Wuchner has any papers to sign. She is close to eighty and hardly able to walk. And I think neither you nor I would want to take the responsibility of trying to get her to come down here. Something serious might happen.

I will say, and I think that is what Mr. Gendel has in mind, without making any stipulation, I will not proceed while Mr. Gendel and I are trying to work out what may be a practical situation. I haven't done that; I will not at all while we go along.

I think, as your Honor pointed out, the question of jurisdiction should be settled and the question as to what the State procedure is should be settled. My only suggestion, from a practical point of view, is that the matter go over for a reasonable time, that we then present—so far as I am concerned, I am willing to present opposition by way of an answer and authorities. And when your Honor has ruled on the question of jurisdiction and given us our day in court, whether it is here or whether it is in the State Court, we will be willing to proceed. And, I might add the addition to the statement I have made, that even pending that and without any restraining orders restraining us, we shall not proceed on any phases of the actions that are pending in the State Courts, so that the rights of any creditors, of anybody involved in this matter, will be conserved.

Mr. Gendel: At this time, on behalf of the Trustee, I would like a ruling on the question of jurisdiction.

I may have misunderstood Mr. Bearman. I thought the question of jurisdiction had been settled and if the Trustee sought to present the matters before a Court we would have it presented here.

I appreciate his position. I think we should not be left in the dark as to whether the position of the Trustee is correct as to the jurisdiction of this Court. And I will point out in support of our position, the Trustee has physical possession, the Trustee has succeeded to the rights of the bankrupt in the contract. The total amount of the balance of

the contract has been tendered, and the Trustee does now tender that total amount, so that there is no question about the fairness of our position.

The State Court proceedings are only in a beginning stage. Nothing has been done there which would justify this Court, in exercising its discretion, in feeling that enough had been accomplished in the State Court to support a ruling of this Court that they should continue, which would be in the discretion of your Honor. I feel, in view of the few pleadings in the State Court, that we should have this matter decided here as a Court of Bankruptcy administering bankrupt assets. I think this matter should be decided in such a way that the Trustee will know what his problems are.

Mr. Bearman says he is in no position to stipulate for the party in this State Court action. I think we might as well have a ruling from the Court.

Mr. Bearman: I serve upon the Trustee at this particular time the Answer of Jennie Wuchner. And I would like to file the original of the Answer in this particular case.

On the question of jurisdiction I misunderstood Mr. Gendel that, for all purposes, this matter was going over. I do not object to the Trustee in Bankruptcy making his ruling on the question of jurisdiction. I am not prepared at this time, frankly, on account of the position I have taken, to argue that matter. But I would say this, that I think before we proceed to carry out the procedure as we have outlined, that first question should be settled.

The Referee: I think we can settle that now. If it is agreeable, the Court may settle the question of jurisdiction.

Mr. Bearman: I do not want to be foreclosed from presenting some authorities and also arguing the matter, and I am not prepared at this time.

The Referee: Let's discuss the matter and see if we have all the facts before us. There is not any question but what the bankrupt was in physical possession, whether he was there with right or without right, he was there. Is that right? At least, he had constructive possession?

Mr. Bearman: I will say this, without answering that question.

Mr. Gendel: Why don't you answer it yes or no?

Mr. Bearman: I will answer the question. I am not trying to straddle. Your Honor asked a very frank question. I might answer it this way: The bankrupt was in San Quentin and he was not over in that place. Now, there was an attachment by one of his creditors. Then there is a bankruptcy that intervenes, and a Receiver is appointed, but prior to the time of all of these proceedings. I won't say it is not a matter that your Honor can't pass on. I say very respectfully to this Court—not in any disrespectful way—that we cannot lose sight of this elementary principle, and that is this: I think it is fundamental that a Trustee in Bankruptcy does not get any greater title than the bankrupt himself had. In other words, so far as the rights of the bankruptcies are concerned, prior to the time of his bankruptcy if he had no title in any real property, the

fact that a bankruptcy intervenes and a lot of creditors come along does not give the Trustee in Bankruptcy any greater rights than the bankrupt himself had.

What are the facts of this particular thing? We maintain this position: We maintain that the bankrupt, even though fifteen or twenty men went into possession, were occupying the same premises, without any legal right, that their rights had ceased, that there was no title. It is our position their rights had ceased. And, if our position is correct, then there is no right of the Bankruptcy Court to administer a title that they haven't got.

The Referee: Changing it the other way, was your client in possession on April 5, 1946, when this bankruptcy began?

Mr. Bearman: I would say, frankly, I would say this, I would say in legal possession. I would not say in physical possession.

I will point out to your Honor: A is the owner of certain property, real property. He enters into a contract with B, that B is to buy this property, but the title is always in A until B has completed payments, and done this and that, and so forth. The contract itself provides time is the essence of the contract, and if there is failure on the part of B to carry out the terms of the contract, there is no right on the part of B to ask that title vest in him, and all rights in the contract cease.

The Referee: Supposing we give you an opportunity to see if you can find any authorities to support that legal position?

Let's move to another thing. What interest, if any, does Dora Hill have in this property?

Mr. Bearman: Dora Hill happens to be the wife of the gentleman who is confined in the penitentiary, up North.

Mr. Gendel: I found that the action for damages sets forth Dora Hill as one of the plaintiffs, although the property itself is supposed to be recorded in the name of Charles Hill, and to eliminate any community property claim——

The Referee (Interrupting): Is Dora Hill a party to the contract, as such?

Mr. Bearman: I think the contract was signed by Charles Hill. But irrespective, I think it is mentioned in Mr. Gendel's Petition, and that is by reason of the community property law. But answering your question, the contract is signed by Charles E. Hill.

The Referee: What is the position of the Trustee here? Is he seeking or asking for a decree of Court to the effect that Mr. Bearman's client has no right, title, or interest, or is he asking for that and also a decree that Mr. Bearman's client is obligated to this estate for certain damages?

Mr. Gendel: Our primary prayer for relief is for quieting title to the property and setting up a method of paying off the balance coming to Mr. Bearman's client. We set up the question of damages in the event Mr. Bearman's client is willing to concede the jurisdiction of the Court to hear that problem. And, we will thresh it all out at one time. If not, we will have to reserve the question of damages for a State Court action.

The Referee: Before you would present the question of damages to this Court—I can't tell from this Petition just what you base your claim for damages on. If the Bankrupt before bankruptcy concedes that the property had been lost by him and then said that because of the loss he was damaged, then perhaps there is no further controversy over the ownership of the property.

Mr. Gendel: That is not the situation.

The Referee: Unless the property was lost how could the bankrupt assert damages, if he still had the property? Do you say because of this foreclosure proceeding he was prevented from making a sale of the property at a profit of \$20,000, which profit he can no longer realize? You don't set up any of these elements.

Mr. Bearman: The question your Honor has raised, you can't simply take those two actions that are pending in the State Courts and say—after all, those have to be settled, either here or in the State Court. The question your Honor has asked is a question that nowhere appears, either in the Petition of the Trustee or in any other actions that are filed.

That is the reason, if you will note, in the first part of my statement to the Court, I made this statement, that they are asking for \$20,000 damages. I am not an authority upon the law of damages, but damages are not just picked out of a hat, like a magician picks them out. They are not speculative. You don't pick them out of nowhere. We all know you cannot recover for any damages that

might be speculative, but on the face of all the pleadings they have filed in this particular matter, I make the statement, without disrespect to eminent counsel, their claims are absolutely silly, for this reason; they set out they have been damaged to the extent of \$20,000 for property we claim we still have, is worth more than you sold it to us for.

They don't set out that "because you sold me certain property and you prevented us from making sales we lost so and so." But they say, "No, we are in possession of property that is worth more than you sold it to us for and we have been damaged to the extent of \$20,000."

I don't see this new order of things. You must have a premise for asking it. Assuming we were litigating this thing, and your Honor had possession and the title of this property is in the hands of the Hills, and I give them \$20,000 worth of damages. This property was bought for \$5500 and it can be sold for so and so, sold at a profit. Where are the damages? The title is still in them.

We have those actions. They must be disposed of. And, it seems to me it is not asking—and I place myself in this position, and I think we all have the right to deal that way, and I would deal that way with Mr. Gendel, and I would certainly deal that way with Mr. Poyet—no rights of any creditors would be harmed. I did not take any action with any restraining orders against me and I did not move, because I knew these things were coming. I shall still maintain that position. But I think we should decide the question of jurisdiction and then go forward.

The Referee: Has there been any tender of the amount to your client?

Mr. Bearman: We have in verified answers filed in the Superior Court denied, under oath, that there has been any tender made to us.

The Referee: Mr. Gendel, has there been any tender made?

Mr. Gendel: For the Trustee?

The Referee: Yes.

Mr. Gendel: No, except in the pleadings, the tender of the amount of any——

The Referee (Interrupting): Is that sufficient? Has the Trustee got the money?

Mr. Gendel: The only place the Trustee will get it is from the sale of the property.

The Referee: This lady certainly is entitled to her money. You mean to say we have the right to come in here and go into it to the extent of trying to determine the rights of the parties and finally come to the question of how the owner is going to receive money for this title, payment of \$4900, and the Trustee hasn't got the money? Maybe I do not know much about the law of tender.

Mr. Gendel: The position taken by the bankrupt and his counsel prior to bankruptcy is that a full and legal tender was made. We have had turned over to the Trustee certain documents which confirm that. The Trustee has in his Petition acknowledged the willingness and the desire to pay those moneys. We have alleged that the property is worth in excess of the balance owing, and that

is the reason this poor old lady is so anxious to get back. All my sympathy stops with her physical condition only. There is nothing more for the Court to decide than in the ordinary situation, as to whether or not a party has a lien or title. If the party has a lien the property will either be sold and the lien paid or if there is not enough there to pay it, the property will be turned back to the lien claimant.

The Referee: It has not been denied that time is the essence of this agreement. Under those circumstances, don't you have to keep the tender good? Can the Court make a decree that the purchaser is entitled to a deed upon the payment of so much money if it has not been, in effect, paid up, a continuing tender; has the Court got jurisdiction, in view of the terms of the contract, to give any further time for the payments?

Mr. Gendel: The tender has been made.

The Referee: It has not been kept good.

Mr. Bearman: Of course, Mr. Gendel, I think I am—and I say this respectfully, I think I am more conversant with this situation than Mr. Gendel is. I have had something to do with it from its very inception. And this particular matter is no different than at the Bank of America or any of the banks here, or any of the Trustees that hold contracts. And, irrespective of the statements that have been made, I have no sympathy for this little old lady outside of the fact that she wants her money.

I think the equities are with my client on this particular matter. And rather than get tied up on

a matter involving everything, she took the position she was entitled to carry out this contract on the terms and conditions made.

It is elementary you cannot talk about a tender and say, "I am willing to do so and so." But a tender means one thing—there is \$10,000 due on this contract. Say, if you go to the Bank of America, in San Pedro, there will be \$10,000 waiting for you, if you call so and so, at 10 o'clock a.m., on the 15th of June. And on June 15th, at 10 o'clock a.m., there is \$10,000 due. That is not a tender. A tender is one that is obligated to make a payment on that particular time, he comes up with lawful money of the United States. And they all specify to whom the money is owed and where to tender that money.

I might say I do not want to embarrass Mr. Gendel because of the fact that they don't have much money in their pocket. The Trustee says, "We will give you the money." I know nobody brings that money with them. But we have a verified complaint denying that tender was made. There has never been any tender, kept alive. If I tender certain things due under a contract and then sit by and don't do anything else, I have not completed what the law of tender is. And if you will look in the books you will find in order to keep that tender alive, that has to be placed to the credit of the one to whom that money is owed.

So we find here this situation, that A says that there was money tendered to us. I am not sure about this situation, where the Trustee goes in—

and we deny there has been a tender. We set out, if you get my point, if the bankrupt had no title and the rights had ceased, and time was the essence of this contract, the mere fact that there are a lot of creditors, among whom is the attorney who defended him on a \$1700 claim, and I am not saying this in disrespect to the attorney, and certain other creditors—that after the rights of the bankrupt ceased the mere fact that there is a bankruptcy, if there isn't any title, then the Trustee does not get any title greater than the bankrupt has.

The Referee: Is there any automatic right of reinstatement on a contract of sale of real property, such as, for instance, on the foreclosure of a deed of trust, where certain installments have not been made?

Mr. Bearman: It cost me a lot of money, that I couldn't subdivide Los Angeles and I couldn't control the real estate market. As your Honor knows, in a mortgage we have an equity of redemption for a year; in a trust deed there is no equity of redemption.

The Referee: Yes, but——

Mr. Bearman: A contract, of course, a contract, just as your contracts under which they buy automobiles, under which they buy washing machines, under which they buy real estate, which sets out that the title is in the seller, and he never passes the question of title until the terms of that contract has been met.

Your Honor must bear this in mind—there is no transfer of title until the purchaser has met, has carried out the terms of the contract. And if he does not carry out all the terms of the contract—and time is made the essence of the contract—there is no duty upon the seller to transfer title to the purchaser. There is not any equity; this title does not pass.

The Referee: All right, now the prayer of this Petition prays this Court issue an order directing Jennie Wuchner and Dora Hill to appear and show cause why the rights of the parties should not be determined by this Court, as hereinbefore set forth; and why the title to said real property should not be declared vested in the Trustee, free and clear of any claim of Wuchner and Dora Hill; and to show cause why the said parties should not be restrained from proceeding with either Superior Court action, pending the determination by this Court of the rights of the parties, and why this Court should not grant Petitioners such other and further relief as may be proper, and so forth. And, includes reference to the action for \$20,000 damages.

Mr. Gendel: Let me make this clear, so that there is no necessity for any ambiguity in the record. In order to present the question of jurisdiction without any possible ambiguity, I think the Trustee's position on this Petition, without prejudice to such rights as might arise on the question of damages, should be solely limited to the question of determining the rights in this piece of property only

pursuant to the contract, and we will have no room for any possible review on the question of jurisdiction.

The Referee: Then I think you should file an Amended Petition and indicate the course you are going to pursue, because in the present Petition two questions are involved. One is the title to the property; and another is the liability of Mr. Bearman's client for damages. We might conclude we had jurisdiction on the question of the title of the property and we might conclude we did not have any jurisdiction on the question of liability of Mr. Bearman's client for damages. You have been through it on the question of jurisdiction to render judgments against persons who appear in the Bankruptcy Court.

Mr. Gendel: Yes, I had a hand in making the power of the Referee a little broader——

The Referee (Interrupting): That claim was on objection to a claim. A claim was asserted, and the Trustee pleaded an offset greater than the amount of the claim. That is a little different. Mr. Bearman's client is not coming into court. Mr. Bearman's client is being brought into this court. Does that give the Court jurisdiction to render an affirmative money judgment against Mr. Bearman's client?

Mr. Gendel: Having gone through that problem and probably having read about as many authorities in the Federal Courts as there are on the question, it is my desire if Mr. Bearman feels his client will be benefitted by having two trials instead of one, to amend the prayer, and we will do it the hard way.

The Referee: You can set it up any way you want, but I think you should set it up specifically.

Perhaps Mr. Bearman at the last minute might concede jurisdiction.

Mr. Gendel: I would rather not play games. We will separate them and we will proceed in that way.

The Referee: I will give the Trustee whatever time is reasonably needed to file an Amended Petition and then set it for hearing, at which time Mr. Bearman, if so advised, may make formal objections to the jurisdiction of the Court and be prepared with such authorities as he may wish to present.

How much time do you want?

Mr. Gendel: Getting it dictated and typed, I would say two weeks time.

Mr. Bearman: I want to get that straightened out. Two weeks passes very quickly. Let's make it three weeks. And I think that the way the Court expressed it is the best way to meet these issues.

May I make one inquiry?

The Referee: Yes.

Mr. Bearman: What is going to happen to those two actions that are pending in the State Court? Will they be heard? Whatever Court should be decided has jurisdiction, if the State Court and the issues involved in this action are tried, or, if it is determined that this Court has jurisdiction, will this Court hear those actions?

The Referee: We will not hear the actions as such. We will hear the issues raised by the actions.

Mr. Bearman: What will happen to those actions?

The Referee: If the decision on the question of title should be against your client, making an order requiring your client to dismiss those actions, as part of the proceedings here. In the meantime I think those actions will automatically stay in status quo. You realize, in the light of this pending bankruptcy, you cannot get a clear title in your State Court proceeding without making the Trustee a party.

Mr. Bearman: Might I say this, Mr. Poyet never filed an answer in the quiet title action, and I never sought to take the default.

The Referee: On the second action, that for damages, being an alleged damage to property, it is my understanding it passes to the Trustee in Bankruptcy, under Section 70 of the Bankruptcy Act. So, the Trustee will not attempt to prevent that action at the moment. If Dora Hill should attempt to prosecute that action singly, upon sufficient showing, this Court would undoubtedly restrain her for the time being.

I will give Mr. Gendel to July 5th to file an Amended Petition. And when shall we then set it for hearing?

Mr. Bearman: I would say three weeks. Mr. Gendel and I might try to see what we could work out.

The Referee: The Trustee may have to and including July 5th to prepare and serve an Amended

Petition, and the Amended Petition will come on for hearing Wednesday, July 17th.

Mr. Bearman: That is agreeable.

The Referee: The first meeting, I will continue to the same date unless there is some objection.

Mr. Gendel: I think we should do that.

The Referee: Mr. Gendel has until July 5th to serve on you and file an Amended Petition, and that Amended Petition will come on for hearing on July 17th.

(Whereupon at 12 o'clock noon a recess was taken in this matter to July 17, 1946.)

State of California,
County of Los Angeles—ss.

I, O. Edgar Abbott, Official Court Reporter, hereby certify that the foregoing 25 pages comprise a full, true, and correct transcript of my stenographic notes taken before Hon. Benno M. Brink, Referee in Bankruptcy, in the Matter of Charles E. Hill, dba Hill Machine Tools, Bankrupt, No. 44,347-W, on the 19th day of June, 1946.

Dated this 13th day of January, 1947.

/s/ O. EDGAR ABBOTT,
Official Reporter.

In the District Court of the United States for
the Southern District of California, Central
Division

In Bankruptcy

No. 44,347-W

In the Matter of

CHARLES E. HILL, dba HILL MACHINE
TOOLS, Bankrupt.

Before: The Honorable Benno M. Brink,
Referee in Bankruptcy.

REPORTER'S TRANSCRIPT OF HEARING
ON ORDER TO SHOW CAUSE BY
GEORGE T. GOGGIN, TRUSTEE, vs. JEN-
NIE WUCHNER, ON NOVEMBER 1, 1946

Appearances:

For the Trustee in Bankruptcy: Martin Gendel,
Esq., 607 James Oviatt Building, 617 South Olive
Street, Los Angeles 14, California.

For Respondent Jennie Wuchner: William W.
Bearman, Esq., and G. T. Fowler, Esq., Suite 306
Taft Building, 1680 North Vine Street, Los Angeles
28, California.

For Respondent Dora M. Hill and for Charles E.
Hill, the Bankrupt: Henry F. Poyet, Esq., 114 Pier
Avenue, Hermosa Beach, California.

* * * * *

TRUSTEE'S EXHIBIT No. 1
AGREEMENT FOR SALE OF REAL ESTATE

This Agreement, made and entered into this 5th
day of June, 1945, between Jennie Wuchner, a

widow, hereinafter called the Seller, and Charles E. Hill, hereinafter called the Buyer,

Witnesseth: That the said Seller in consideration of the covenants and agreements hereinafter contained and made by and on the part of the Buyer, agrees to sell and convey unto the said Buyer, and the said Buyer agrees to buy all that property in the City of Redondo Beach, County of Los Angeles, State of California, described as:

Lots 11, 12 and 13, in Block 173, of Rendodo Beach, in the City of Redondo Beach, County of Los Angeles, State of California, as per map recorded in Book 39, Page 1, Miscellaneous Records of said County.

Subject to: Covenants, conditions, restrictions, reservations, rights, rights of way and/or easements, if any, of record,

for the sum of Fifty-five Hundred Dollars (\$5500.00), lawful money of the United States, and the said Buyer, in consideration of the premises, agrees to buy and pay the sum of Fifty-five Hundred Dollars (\$5500.00) as follows to-wit:

\$350.00

\$149.38 upon the execution and delivery of this Agreement, receipt of which is hereby acknowledged, and the further sum of Two Hundred Dollars (\$200.00) or more on or before the first day of June, 1945 and two hundred dollars (\$200.00) or more on or before the first day of each calendar month thereafter until the sum of Fifteen Hundred Dollars (\$1500.00) shall have been paid on the principal sum,

together with interest thereon at the rate of 6% per annum. Each payment shall be credited first on interest then due and the remainder on principal; and interest shall thereupon cease upon the principal so credited. Should default be made in payment of any installment when due the whole sum of principal and interest shall become immediately due at the option of the Seller. If action be instituted on this contract, Buyer to pay such sum as the Court may fix as attorney's fees whether such action progress to judgment or not.

The Buyer shall be let into, and have immediate possession of said premises, but the Buyer shall make no changes or alterations in or to any of the buildings now on said premises, nor remove any portion thereof, without the consent of the Seller therefore, until after the sum of Fifteen Hundred Dollars (\$1500.00) has been paid on the principal sum of the purchase price herein specified; and it is agreed that time is the essence of this Contract, and in the event of failure to comply with the terms hereof by said Buyer, then the Seller shall be released from all obligations of law and equity to convey said premises, and the Buyer shall forfeit all right thereto and to all money theretofore paid under this contract; but the said Seller on receiving full payments, at the time and in the manner above mentioned, agrees to deliver to the said Buyer a policy of Title insurance, showing the title to said property to be vested in the Seller, free of incumbrance except as above stated and to execute and deliver to the said Buyer, or assigns, a good and sufficient deed of grant, bargain and sale.

It is further agreed that immediately after said Fifteen Hundred Dollars (\$1500.00) has been paid on the principal sum due herein, Seller agrees to deliver to said Buyer, a policy of Title Insurance showing the title to said property to be vested in the Seller free of incumbrances except as above stated, or as may be created or suffered by Buyer and to execute a good and sufficient deed to the Buyer and the Buyer agrees to execute to Seller a note secured by a Trust Deed on the premises for the balance due under this Contract, payable in installments of Fifty Dollars (\$50.00) or more per month, with interest at the rate of 6% per annum.

1945-46 taxes to be paid by Buyer and Buyer shall pay all subsequent taxes due on said property and all assessments of whatsoever nature which may become due on said property, insurance to be pro-rated as of this date, and Buyer shall keep the buildings on said premises insured until said property is paid for.

Buyer shall not assign any interest under this Contract without the written consent of Seller.

It is mutually agreed that the provisions of this Contract shall apply to and bind the heirs, executors, administrators and assigns of the parties hereto.

Witness our hands this 5th day of June, 1945.

/s/ CHARLES E. HILL,

/s/ MRS. JENNIE WUCHNER,

Seller,

/s/ CHARLES E. HILL,

Buyer.

It is further agreed that any default shall not become effective for Thirty Days (30) from date of said default.

/s/ MRS. JENNIE WUCHNER,
Seller,
/s/ CHARLES E. HILL,
Buyer.

State of California,
County of Los Angeles—ss.

On this 22nd day of January, A. D. 1946, before me, H. F. Poyet, a Notary Public in and for said County and State, personally appeared Charles E. Hill, known to me to be the person whose name is subscribed to the within Instrument, and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] /s/ H. F. POYET,
Notary Public in and for Said
County and State.

My Commission Expires Dec. 5, 1949.

PAYMENTS

Date Paid M. D. Y.	Date Due M. D. Y.	Amount Paid	Credited on Interest Principal	Balance of Prin. Unpaid
7/ 1/45				5500.00
7/ 2/45		350.00	350.00	5150.00
8/ 1/45	8/ 1/45	200.00	25.75 174.25	4975.75

TRUSTEE'S EXHIBIT No. 2
NOTICE

To Charles E. Hill:

You Will Please Take Notice that the undersigned, Jennie Wuchner, designated as the "Seller" in that certain Agreement drawn between the undersigned as "Seller" and Charles E. Hill as "Buyer" on the 5th day of June, 1945, providing for the sale and purchase of real property located in Redondo Beach, County of Los Angeles, State of California, as more particularly described in said Agreement, hereby notifies you:

That there having been default in the payment of installments provided for in said Agreement on the part of the Buyer, the Seller hereby exercises the Option contained therein and declares the whole amount of principal and interest now due and unpaid under said Agreement namely the sum of \$4912.63 due and hereby demands that you pay forthwith to the Seller the said sum of \$4912.63, being the principal and interest now due and unpaid.

Dated this 5th day of February, 1946.

/s/ MRS. JENNIE WUCHNER.

[Postoffice Department Return Receipt No. 2569 for registered article attached.]

[Letterhead Martin Gendel, Attorney at Law.]

Re: Charles E. Hill, Bankrupt

In order that there may be no question concerning the willingness of the trustee to complete the tender of monies heretofore made to you by the bankrupt, enclosed herewith you will find the check of George T. Goggin, as Trustee of the estate of Charles E. Hill, bankrupt, which check is countersigned by Benno M. Brink, Referee, being check No. 5, in the sum of \$5,035.43, being dated June 27, 1946.

This check is tendered in full payment of all monies owing on the Charles E. Hill sales contract covering the real property and improvements thereon as described in said contract dated June 5th, 1945.

The amount is computed in the following manner: Principal and interest, as requested by you, in the sum of \$4,912.63, as demanded by your notice of February 5th, 1946, with interest thereon at the rate of 6% per annum to and including the date of tender of same.

The undersigned is the attorney for George T. Goggin, Trustee in said bankruptcy, and makes this tender on behalf of George T. Goggin, Trustee, and on behalf of said estate.

Very truly yours,

MG:DA

MARTIN GENDEL.

Encl.

DO NOT DETACH

Pmt in full & settlement
of all claims of Jennie
Wuchner re written agree-
ment for purchase of real
property & improvements
thereon

11878

TO

THE FARMERS AND MERCHANTS
NATIONAL BANK OF LOS ANGELES

16-1 LOS ANGELES, CALIFORNIA

12

11878

GEORGE T. GOGGIN

TRUSTEE IN BANKRUPTCY
617 H. W. Hellman Bldg.
MU. 2248

NO. 5

PAY TO
THE ORDER OF

LOS ANGELES, CALIF., June 27, 1946

JENNIE WUCHNER

\$ 5,035.43

FIVE THOUSAND THIRTY FIVE and 43/100 - - - - DOLLARS.

RESIDENT TRUSTEE OF THE ESTATE
CHARLES E. HILL, dba
HILL MACHINE TOOLS

COUNTERSIGNED

REFERENCE

BANKRUPT

511 North Elena
Redondo Beach, California
July 1, 1946

George T. Goggin, Trustee in Bankruptcy, for
Charles E. Hill and Charles E. Hill, doing
business as Hill Machine Tools.

Martin Gendel
Attorney at Law
617 South Olive Street
Los Angeles 14, Calif.

Charles E. Hill and Dora Hill, c/o Martin Gendel,
Attorney at Law, 617 South Olive Street, Los
Angeles 14, Calif.

There has just received by me in a letter dated
June 28th, a check dated June 27, 1946, in the sum
of \$5,035.43. This check was accompanied by a let-
ter, copy of which is herewith enclosed. Answering
this letter, I desire to say, as I have said in verified
Answer filed in the Superior Court in Case No.
511,064, entitled, Charles E. Hill and Dora Hill,
Plaintiffs vs. Jennie Wuchner, a Widow, Jane Doe,
John Doe and Doe Corporation, Defendants, that
there was never any tender of moneys made by the
bankrupt and/or Dora Hill, and/or anyone in their
behalf, and that the undersigned commenced an ac-
tion in the Superior Court of the State of California,
No. 501-751 entitled Jennie Wuchner vs. Charles E.
Hill and Mrs. Charles E. Hill; that said action was
filed on the 19th day of February, 1946, after the
undersigned had declared the principal and interest
due under a contract for the purchase and sale of

certain real estate, as set out in said complaint, and that no answer has ever been filed to said action, which is an action to quiet title and for failure to comply with the terms and conditions of said contract and that, although time is made the essence of said contract, and the said Charles E. Hill and Dora Hill were notified of defaults in the contract and of the total amounts due, said defaults were not cured nor payments made, nor tenders made, and that the undersigned, pursuant to the terms of said contract, elected to declare the amount of principal and interest due and brought said action after notices to quiet title to said property referred to in said action No. 510,751. This action to quiet title is still pending in the Superior Court of Los Angeles County and, as hereinabove set out, no answer has ever been filed in said action by the said Charles E. Hill, or Charles E. Hill doing business as Hill Machine Tools and/or Dora Hill; and that since said action a petition in bankruptcy was filed against Charles E. Hill doing business as Hill Machine Tools.

There was also an action for declaratory relief, filed in the Superior Court after the action hereinabove referred to was filed, in behalf of Charles E. Hill and Dora Hill against Jennie Wuchner, et al., in which said action Jennie Wuchner filed a verified answer. This action is still pending in the Superior Court of Los Angeles County and has not been disposed of.

The undersigned advises you that, pursuant to that contract, in which time was made the essence

of the terms thereof, in event of failure to comply with the terms thereof by said buyer, namely, Charles E. Hill, then the seller, Jennie Wuchner, shall be released from all obligations in law and equity to convey said premises to buyer, and the buyer shall forfeit all right thereto. This contract was entered into on the 5th day of June, 1946, and; as set out above, there having been defaults, the said Jennie Wuchner filed her action as hereinabove set forth.

For the above reasons, the undersigned is returning to you the above referred to check.

Respectfully yours,

JENNIE WUCHNER,

By /s/ WILLIAM W. BEARMAN,

Her Attorney.

WWB:ft

Encls

(Copy)

[Letterhead Martin Gendel, Attorney at Law.]

June 28, 1946.

Mrs. Jennie Wuchner

c/o Wm. W. Bearman, Esq.

1680 N. Vine Street

Los Angeles 28, Calif.

Re: Charles E. Hill, Bankrupt

Dear Madam:

In order that there may be no question concerning the willingness of the trustee to complete the

tender of monies heretofore made to you by the bankrupt, enclosed herewith you will find the check of George T. Goggin, as Trustee of the estate of Charles E. Hill, bankrupt, which check is countersigned by Benno M. Brink, Referee, being check No. 5, in the sum of \$5,035.43, being dated June 27, 1946.

This check is tendered in full payment of all monies owing on the Charles E. Hill sales contract covering the real property and improvement thereon as described in said contract dated June 5th, 1945.

The amount is computed in the following manner: Principal and interest, as requested by you, in the sum of \$4,912.63, as demanded by your notice of February 5, 1946, with interest thereon at the rate of 6% per annum to and including the date of tender of same.

The undersigned is the attorney for George T. Goggin, Trustee in said bankruptcy, and makes this tender on behalf of George T. Goggin, Trustee, and on behalf of said estate.

Very truly yours,

/s/ MARTIN GENDEL.

MG:DA

Encl

WUCHNER'S EXHIBIT No. 1

NOTICE

To Charles E. Hill

You are hereby notified that by reason of the default by you in the payment of installments provided for in that certain agreement in writing made and entered into on or about the 5th day of June 1945 by and between yourself and the undersigned, Mrs. Jennie Wuchner, providing for the sale and purchase of that real property in the City of Redondo Beach, County of Los Angeles, State of California, described as follows:

Lots 11, 12 and 13, in Block 173, Redondo Beach, in the City of Redondo Beach, County of Los Angeles, State of California, as per map recorded in Book 39, Page 1, Miscellaneous Records of said County.

Subject to: Covenants, conditions, restrictions, reservations, rights, rights of way and/or easements, if any, of record.

That the undersigned hereby declares said contract forfeited and cancelled.

Dated this 8th day
February, 1946.

MRS. JENNIE WUCHNER.

[Post Office Department Return Receipt No. 3518 for registered article attached.]

HENRY F. POYET,

called as a witness on behalf of the Trustee, and having been first duly sworn by said Referee in Bankruptcy, testified as follows:

Q. (By the Referee): What is your name, for the record?

A. Henry F. Poyet.

Direct Examination

By Mr. Gendel:

Q. Mr. Poyet, you have been connected with the Angelus Escrow Service Company; is that right?

A. That is right.

Q. As President of that Company?

A. Yes.

Q. You are also a practicing attorney at law?

A. That is right.

Q. You were representing Mr. Charles E. Hill, were you, during the month of February, 1946?

A. Yes. I commenced to represent him in January, 1946.

Q. Now, can you tell us approximately when the Trustee's Exhibit No. 2—I think it is—first came to your attention?

Mr. Bearman: What is the Trustee's Exhibit No. 2?

Mr. Gendel: The demand for the payment of the \$4912.63.

Mr. Bearman: I object to that on the grounds that it is incompetent, irrelevant and immaterial.

The Referee: The objection is overruled. It is preliminary.

(Testimony of Henry F. Poyet.)

A. As I recall, it was around the 6th or 7th of February, 1946.

Mr. Bearman: I object to that——

The Witness: A copy of it was sent to me from Mr. Hill in San Quentin, and I believe that this particular notice was served on him as stated in this particular letter.

Mr. Bearman: That latter part should go out; it is hearsay.

The Referee: Yes, that may go out.

Q. (By Mr. Gendel, resuming): It was shortly after the 6th of February that it first came to your notice? A. Yes, that is correct.

Q. What did you do then so far as Mrs. Wuchner was concerned?

A. After receiving this notice—first, I might state that just prior to this notice—(interrupted).

Mr. Gendel: Now, if I miss something, tell me later Mr. Poyet, because I want to keep it in order.

The Witness: All right.

Q. Did you, after receiving this letter, send any communication to Mrs. Wuchner?

A. I did send a copy of it to Mr. Bearman's office in Hollywood.

Mr. Bearman: That is objected to as leading.

The Referee: Let it stand and we will see if he can prove it.

Q. I now show you what purports to be a copy of a letter on the Stationery of the Angelus Escrow Service Company, dated February 11th, 1946, and

(Testimony of Henry F. Poyet.)

ask you if that is in substance a copy of the letter you sent to Mrs. Jennie Wuchner?

A. That is the original letter I sent to Mrs. Jennie Wuchner under date of February 11th, 1946 together with the enclosures and statement of identity.

Mr. Gendel: I want to strike out the word "copy" because I don't want the record confused.

The Referee: Just a moment. How does the witness happen to have the original of the letter now?

The Witness: Well, your Honor, she mailed it back under date of February 14th, 1946, with a letter of her own, returning the letter I sent and the escrow instructions and the statement, all intact.

Q. (By Mr. Gendel): What did you enclose in the letter of February 11th to Mrs. Wuchner?

A. The letter, escrow statement, and escrow instructions signed by Charles E. Hill—that is, signed "Charles E. Hill by Dora M. Hill his Attorney in Fact," and to be signed by Mrs. Jennie Wuchner, providing for the payment of \$4,912.63 for a clear title to Lots 11, 12 and 13, in Block 173 of Redondo Beach, in the City of Redondo Beach, County of Los Angeles, State of California, as per map recorded in Book 39, Page 1, Miscellaneous Records of said County.

Q. Did you likewise accompany that letter with a statement of identity?

A. Yes; the statement of identity was attached.

Q. What was the manner of mailing that letter?

(Testimony of Henry F. Poyet.)

A. Through the regular postal delivery, addressed to 511 North Elena, Redondo Beach, California, to Mrs. Wuchner.

Q. Did you state that you mailed a copy of it to Mr. Bearman, the attorney here?

A. That is my recollection.

Q. What did you mail to him?

A. A copy of the escrow instructions—I might be mistaken, but my recollection is a copy of the escrow instructions and, well, the identical letter was sent to him for his information.

Q. Now, you say that you received these back in the mail? A. I did.

Mr. Gendel: You have seen this, Mr. Bearman, but you might like to see it again.

Mr. Bearman: Yes, and just in passing and without interrupting, does it show where that was mailed and where it was sent?

Q. (By Mr. Gendel): Do you remember in what post office box or mail box the original letter of February 11th and the enclosures with it were deposited?

A. Yes, in the post office in Hermosa Beach, California.

Q. Do you know who did the mailing?

A. Yes, I think it was Mrs. Hill; I think she did.

Mr. Bearman: We object unless he knows of his own knowledge, and what he has just testified would be purely hearsay.

(Testimony of Henry F. Poyet.)

The Witness: They were actually mailed to her.

Mr. Bearman: I move to strike that out, your Honor.

The Referee: Yes, that will go out; but, gentlemen, are we not consuming a lot of time over something that is of no consequence? The witness has stated that he has the letter returning all that.

Mr. Bearman: Yes.

Mr. Gendel: Very well, your Honor.

Q. (By Mr. Gendel): I show you a letter dated February 14th, 1946, directed to "H. F. Poyet, Attorney at Law, 114 Pier Avenue, Hermosa Beach, California," signed "Mrs. Jennie Wuchner" in ink and typewriting, that is, in longhand and typewriting; how and when was that received by you?

A. That was received by me through the United States mail on or about February 14th, 1946, in an envelope, and it enclosed this letter signed by Mrs. Jennie Wuchner and also returned the letter dated February 11th, 1946, signed by myself as President of the Angelus Escrow Service Company to Mrs. Jennie Wuchner, and also returned the original escrow instructions in Escrow No. 32 unsigned by her, as well as the statement of identity.

Mr. Gendel: I would like to introduce this letter and these documents as one exhibit, as our next exhibit in order, or rather the Trustee's exhibit next in order.

(Testimony of Henry F. Poyet.)

TRUSTEE'S EXHIBIT No. 4

Redondo Beach, California

February 14, 1946

Mr. H. F. Poyet
Attorney at Law
114 Pier Avenue
Hermosa Beach, California

I am returning herewith Escrow Instructions No. 32, in the same condition in which they were received.

Non-compliance with the terms of the contract entered into by Jennie Wuchner and C. E. Hill, covering sale and purchase of property described in the contract, has caused same to be forfeited and cancelled.

Yours very truly,

/s/ MRS. JENNIE WUCHNER

[Letterhead—Angelus Escrow Service Company]

In Reply Refer to Escrow No. 32.

Escrow Officer: H. F. Poyet.

February 11, 1946.

Mrs. Jennie Wuchner
511 North Elena
Redondo Beach, California

Dear Mrs. Wuchner.

In accordance with our previous letter to you and in accordance with your demand of February 5, 1946 directed to Mr. Charles E. Hill referring to the purchase agreement between yourself and

(Testimony of Henry F. Poyet.)

Trustee's Exhibit No. 4—(Continued)

Charles E. Hill covering the property at 732 North Pacific avenue in Redondo Beach, more particularly described in the agreement of June 5th, 1945 to which reference is hereby made, we have prepared the instructions for your signature and ask that if you will execute them, and return to us we shall be pleased to order the policy of title Insurance from such company as you prefer or if you have no preference we shall order it from the Title Insurance and Trust Company of Los Angeles, forwarding you a copy of the preliminary report.

This is to advise you that there is on deposit at this time the full amount of your demand of \$4912.63 subject to the escrow instructions for clear title as therein set forth.

Awaiting your instructions and pleasure,

Very truly yours

/s/ H. F. POYET

Henry F. Poyet. President

ESCROW INSTRUCTIONS—BUYER

Escrow No. 32. H. F. Poyet, Escrow Officer
Angelus Escrow Service Corporation as Escrow
Holder:

February 11, 1946

Gentlemen:

In Consideration of your acting as escrow holder herein, it is agreed that:

1. Negotiable or non-negotiable instruments received by you may be transmitted for collection, to

(Testimony of Henry F. Poyet.)

Trustee's Exhibit No. 4—(Continued)

drawee or other obligee if it be a Bank or through collecting agents in the usual course of business, and you shall not be held liable for default of any drawee, obligor, or collecting agent, for loss in transit, or otherwise, until proceeds in actual cash come into your possession.

2. You shall not be liable for the failure of any condition of this escrow, or damage caused or omissions done in good faith, or for any claim or loss claimed or suffered by any party hereto, by the exercise of your discretion in any particular manner, or any other reason except deliberate wilful neglect or gross misconduct; and you will not be held responsible for forgeries, or false personations in connection with these instructions, instruments of record, or those handed into escrow; nor for any failure to comply with any provision of any agreement or other document filed in or referred to in this escrow.

3. You are not bound to recognize any notice, demand, or change of instructions, as having any effect in this escrow unless given in writing by all parties considered by you to be affected thereby.

4. It is further agreed that if any controversy arises, or if conflicting demands be made, between or by the parties hereto or any third person, you shall have the absolute right either to withhold and suspend all further proceedings in performance of the escrow and wait a settlement of the controversy, or file a suit of interpleader and obtain an order of

(Testimony of Henry F. Poyet.)

Trustee's Exhibit No. 4—(Continued)

Court requiring the parties to interplead and litigate their claims and rights among themselves; and the parties hereto jointly and severally promise to pay on demand, as well as indemnify and hold you harmless, as escrow holder, from any damages, attorney's fees or other expenses, obligations, or liabilities made in good faith or arising out of the above or any other procedure in escrow.

5. You are given a lien on all rights, titles, and interests of each of the parties hereto in his escrow papers, and other property, and moneys arising therefrom, to protect yourself, to indemnify yourself, and to reimburse yourself, for all costs, expenses, and liabilities caused by such party.

Paid outside.....	\$
Cash in escrow.....	\$4912.63
Encumbrances of record assumed..	\$
New encumbrance.....	\$
Total consideration.....	\$4912.63

I will also execute and deliver to you before the time limit hereinafter named, any instruments, including notes secured by encumbrances I create, and additional funds required from me to enable you to comply with these instructions, all of which you are authorized and instructed to use provided instruments have been filed for record entitling you to procure assurance of title in the form of a policy of Title Insurance issued by Title Insurance and Trust Company Title Guarantee and Trust Company;

(Testimony of Henry F. Poyet.)

Trustee's Exhibit No. 4—(Continued)

National Title Insurance Company or Security Title Insurance and Trust Company in the issuing company's usual form, with liability of such title company limited to not less than \$4912.63 (if a Continuation Guarantee or Certificate is procured, the above liability shall apply to it only, on the following described property in the City of Redondo Beach, County of Los Angeles, State of California, viz:

Lots 11, 12, and 13, in Block 173, of Redondo Beach, in the City of Redondo Beach, County of Los Angeles, State of California as per map recorded in Book 39 page 1 miscellaneous records of said county.

as per map recorded in Book 39 Page 1 of M R records in said county showing: Title vested in Charles E. Hill.

Free of encumbrances except taxes for the fiscal year 1945-1946 taxes, and personal property taxes, if any, of any former owner, if same are a lien against this property, and any and all taxes levied or assessed subsequent to date of these instructions;

Assessments and/or bonds, as follows: none.

Conditions, restrictions, reservations, rights, rights-of-way and easements, now of record, if any; None.

If said assurance of title does not cover municipal liens in the city named, obtain a municipal lien report dated during this escrow from any agency customarily employed by you, showing said property clear of such liens, not expected above. Should

(Testimony of Henry F. Poyet.)

Trustee's Exhibit No. 4—(Continued)

said Municipal Lien Report disclose any liens not excepted above, it will be satisfactory if said liens are paid through this escrow and without cost to me.

The following adjustments only are required in this escrow.

I agree to pay on demand, regardless of the consummation of this escrow all charges incurred by you on my behalf including the title company's new owner fee and fee for showing the lien of any encumbrance I create, if such charges are made, in addition to the fee for recording deed, escrow fee.

Time is declared to be the essence of these instructions and in the event that the terms and conditions of this escrow have not been complied with on or before the first day of May 1946, at the hour of 5:00 p.m., you are authorized and instructed to complete this escrow as soon as practicable thereafter,

Provided, however, that at any time after said day and hour, I have fulfilled my obligations under this escrow while there exists any default of the obligations of seller herein, I may demand the return of the documents and/or moneys deposited by me in this escrow, and upon being reimbursed for all of your charges and expenses in connection herewith, you are to comply with such demand and terminate the escrow, and

Provided, also, that at any time after said day and hour, should seller have fulfilled their obligations under this escrow while there exists any default of my obligations herein, I may demand the return of

(Testimony of Henry F. Poyet.)

Trustee's Exhibit No. 4—(Continued)

the documents and/or moneys deposited by them in this escrow, and, upon being reimbursed for all of your charges and expenses in connection herewith, you are to comply with such demand and terminate the escrow.

No commission is payable out of this escrow other than as hereinabove set forth.

Each of the undersigned states he has read the foregoing instructions and understands and agrees to them.

CHARLES E. HILL

By /s/ DORA M. HILL

His attorney in Fact.

Address: 621 No. Iuna Ave. Redondo Beach Calif.
Phone: 3846.

SELLER

Hermosa Beach, Calif.,

February 11, 1946.

The foregoing instructions, terms and conditions are hereby approved and accepted in their entirety and concurred in by me, I will supply you with a deed executed by Jennie Wuchner, a widow of the property described together with/or other insurance demanded, if any, and which you are authorized to deliver, provided that within the time limit or close of escrow specified you hold for the account of Jennie Wuchner the sum of \$4912.63 together with any additional moneys and all instruments deliverable to me under these instructions.

(Testimony of Henry F. Poyet.)

Trustee's Exhibit No. 4—(Continued)

Instruct the Title Company to begin search of title at once and I will pay their charges on demand. I also will pay on demand all costs and charges (except those which the buyer has agreed to pay) as follows: Charges for assurance of title, escrow fee,

Affix and cancel Internal Revenue Stamps on my deed in the amount of \$ _____, I agree to pay for same.

Issue your check for balance in favor of Jennie Wuchner and credit—mail to 511 North Elena, Redondo Beach, California.

Time is declared to be the essence of these instructions and in the event that the terms and conditions of this escrow have not been complied with on or before the first day of May, 1946, at the hour of 5:00 p.m., you are authorized and instructed to complete this escrow as soon as practicable thereafter,

Provided, However, that at any time after said day and hour, should I have fulfilled my obligations under this escrow while there exists any default of the obligations of buyers herein, I may demand the return of the documents and/or moneys deposited by me in this escrow, and upon being reimbursed for all of your charges and expenses in connection herewith, you are to comply with such demand and terminate the escrow, and

Provided also, that at any time after said day and hour, should buyers have fulfilled their obligations under this escrow while there exists any

(Testimony of Henry F. Poyet.)

Trustee's Exhibit No. 4—(Continued)

default of my obligation herein, I may demand the return of the documents and/or moneys deposited by them in this escrow and upon being reimbursed for all charges and expenses in connection herewith, you are to comply with such demand and terminate the escrow.

No commission is payable out of this escrow other than as hereinabove set forth.

Each of the undersigned states he has read the foregoing instructions and understands and agrees to them.

Address:

Phone:

CONFIDENTIALinformation for use by the Title Company in
searching the records in connection with its**ORDER NO.**

15

**MY
FULL NAME**

(FIRST NAME) (FULL MIDDLE NAME - IF NONE, INDICATE) (LAST NAME)
Birthplace _____ Year of Birth _____ Race _____
I have lived continuously in the U. S. A. since _____
(If married, complete the following:)
Full name of { wife
husband (FIRST NAME) (FULL MIDDLE NAME - IF NONE, INDICATE) (LAST NAME)
Birthplace _____ Year of Birth _____ Race _____
SHE
HE has lived continuously in the U. S. A. since _____
We were married on _____ at _____
(DATE) (PLACE)
Wife's maiden name _____

**RESIDENCES
AND
OCCUPATIONS
DURING
PAST 5 YEARS**

RESIDENCES
NUMBER AND STREET CITY FROM (DATE) TO (DATE)
NUMBER AND STREET CITY FROM (DATE) TO (DATE)
OCCUPATIONS
(Husband's) FIRM NAME LOCATION
FIRM NAME LOCATION
(Wife's) FIRM NAME LOCATION
FIRM NAME LOCATION
(If more space needed, use reverse side of form)

**ANY
FORMER
MARRIAGE
OR
MARRIAGES**

(If no former marriage or marriages, write "None" Otherwise, please complete the following:)
Name of former wife _____
Deceased _____ Divorced _____ When _____ Where _____
Name of former husband _____
Deceased _____ Divorced _____ When _____ Where _____
(If more space needed, use reverse side of form)

THE STREET ADDRESS of the property in this transaction is: _____
(Leave Blank if None) DRIVE
AVENUE
STREET

Date _____

SIGNATURE

(If married, both husband and wife should sign)

SIGNATURE

BUSINESS PHONE _____ HOME PHONE _____

The filling out of this form will help protect you and will speed the completion of your order.
Should you want to know why, an explanation will be found on the other side.

(Testimony of Henry F. Poyet.)

Trustee's Exhibit No. 4—(Continued)

THERE REALLY IS A REASON

We don't like to ask you to fill out this statement of indemnity. We don't want you to think we are unnecessarily interested in your personal affairs. We are not. We have been asked to insure a title to real property in which you are interested, and if you will give us the information called for, it will help us do our job quickly and well.

The population of the Los Angeles area has been estimated at more than three and a half million people. Please think for a moment how many have the same or similar names. In searching your title we will inevitably encounter judgments, bankruptcies, divorces, income-tax liens—and yes—insanity commitments, against persons with names similar to yours. Such matters cloud the title to your property unless eliminated by information showing you are not the person involved in these difficulties. You see, then, that we need to know something about you—and, on account of California's community property laws, something about your wife too, if you are married—so that we may promptly ignore all matters not directly affecting you or the property being searched.

All we are trying to say is that by filling out this form in full, you are helping us give you the kind of service you would like to have.

YOUR TITLE INSURANCE COMPANY

(Testimony of Henry F. Poyet.)

Mr. Bearman: We object to that on the grounds that it is immaterial—or, let me state it this way: on the grounds that it is too remote, and immaterial, and no foundation laid.

The Referee: What foundation has not been laid?

Mr. Bearman: I don't know that he was authorized to represent the Hills at that time.

The Referee: That may be incompetent, I don't know and we can't tell as to that at this time, but certainly the foundation has been laid for the introduction of the documents. The objections are overruled. Trustee's Exhibit No. 4. Proceed.

Q. (By Mr. Gendel): Mr. Poyet, in connection with the statements contained in your letter of February 11th, 1946, tendering the \$4,912.63, did you at that time have that money in the Angelus Escrow Service Company? A. We did.

Q. And the sole condition in connection with the payment of that money was obtaining a certificate of title insurance; is that right?

A. That is right.

Q. And that was pursuant to the terms of the Agreement for Sale of Real Estate, the Trustee's Exhibit No. 1 here; is that correct?

A. Yes, that is correct.

Mr. Gendel: That is all, for Mr. Poyet, at this time.

The Referee: Have you any questions, Mr. Bearman?

Mr. Bearman: Yes, your Honor.

(Testimony of Henry F. Poyet.)

Cross-Examination

By Mr. Bearman:

Q. Mr. Poyet, I think you stated very plainly that you didn't remember sending me a copy of the escrow instructions; is that correct?

A. I sent you copies of everything else, and it is my recollection that I sent you copies of those, too. I might be mistaken in that; but I did discuss it with you, that I do know, Mr. Bearman.

Mr. Bearman: May I see those escrow instructions, your Honor, please?

The Referee: Yes.

Q. (By Mr. Bearman): You say you discussed the escrow instructions with me, Mr. Poyet?

A. Yes, Mr. Bearman.

Q. And when was the first discussion you had with me and how and where did it take place?

A. Well, my first discussion with you was—
(Interrupted.)

Mr. Bearman: I will withdraw that question at this time. I don't think it is important.

Q. Now, this Escrow No. 32, which refers to, or rather it says: "Escrow Instructions Buyer Angelus Escrow Service Corporation" dated "February 11, 1946." That instruction, or this instruction which has been offered here by the Trustee, in evidence as a part of Trustee's Exhibit No. 4 is signed: "Charles E. Hill By Dora M. Hill His Attorney In Fact" and it says: "Cash in escrow \$4912.63"—and I am reading from the body of the Escrow Instructions. Now, I will ask you, Mr. Poyet,

(Testimony of Henry F. Poyet.)

whether or not there was an escrow which this refers to in which Mr. Charles E. Hill had, absolutely, \$4912.63 of his own funds or his own money in that escrow?

Mr. Gendel: Just a moment. I object to that question, as to whether he had his own funds or his own money there as being incompetent, irrelevant and immaterial. Mrs. Wuchner is not concerned with whose money it is so long as it is being paid to her.

The Referee: Well, yes, the question is proper; it is a proper question. Counsel desires to ascertain whether or not the sum of money in question was under the control and disposition of Charles E. Hill.

Mr. Bearman: That is exactly right, your Honor.

The Referee: Where he got the money from is immaterial; but if the money was in the escrow subject to the order of Mr. Hill it would be his money, whether he owed it to anybody else or not. The objection is overruled.

Mr. Glendel: I have no objection to the witness answering that question.

The Witness: I will answer that question this way: Mrs. Hill took \$4912.63 in cash with Frank Bruno and Teddy Berg and took it to Mrs. Wuchner—(interrupted).

Mr. Bearman: Just a moment.

Mr. Gendel: Just a moment.

The Referee: The witness will answer the question, the question being: Was there in this particular escrow at the time in question the sum

(Testimony of Henry F. Poyet.)

mentioned, \$4912.63, to the credit of Charles E. Hill and subject to his order and disposition?

Mr. Bearman: That is right; that is correct.

The Referee: Now, let the witness answer.

The Witness: We did not have it in this particular escrow, no.

The Referee: That is all on that, then.

Mr. Bearman: Yes. That is all.

The Referee: Go ahead.

Mr. Bearman: We have no more questions.

The Referee: Have you any further questions, Mr. Gendel?

Mr. Gendel: Yes, your Honor.

The Referee: You may proceed.

Redirect Examination

By Mr. Gendel:

Q. Mr. Poyet, under what circumstances was the \$4912.63 available.

Mr. Bearman: Objected to as incompetent, irrelevant and calling for a conclusion of the witness. Not material.

The Referee: The objection is overruled. (Pause.) Go ahead and answer the question, Mr. Poyet.

A. This property was sold to a Mr.—(pausing).

Q. (By Mr. Gendel): Let me ask you a little differently, so as not to get too far afield: In what manner were you going to pay the \$4912.63 if the escrow instructions as recorded were signed and returned pursuant to your demand?

Mr. Bearman: Objected to as incompetent, ir-

(Testimony of Henry F. Poyet.)

relevant and immaterial. The escrow instructions have been introduced here, and testimony introduced that there was so much money on deposit that belonged to the Hills or that they had dominion over.

The Referee: No, they can go a step farther. You have ascertained that at the time in question there was no money in this particular escrow over which Mr. Hill had control.

Mr. Bearman: Yes, that is right.

The Referee: And if they can show that there was some other escrow from which Mr. Hill was then entitled to receive money and in which he had given instructions that the money be paid into this escrow that would be proper.

Mr. Bearman: I see what you mean, but I think Mr. Gendel's question is asking for something the witness has in mind. It is not proper as to form.

The Referee: I think the question might be improved upon as to form, but we all know what he is asking about.

Mr. Bearman: Will you read the question, Mr. Reporter?

(The Reporter read the last question by Mr. Gendel.)

Mr. Gendel: I will withdraw the question.

The Referee: Well, let me ask him: Mr. Poyet, do you know of any transaction at or about the time with which we are here concerned in which Mr. Hill was entitled to receive money?

Mr. Bearman: I object to the question propounded by the Court, on the grounds that I think

(Testimony of Henry F. Poyet.)

it is incompetent, irrelevant and immaterial. In other words, he might have something in mind whereby he was going to obtain money, but the question is whether he had in that escrow certain money and that money was on deposit at a particular place for this purpose.

The Referee: Perhaps it is not legally sufficient, but our desire here is to get all the facts in pertaining to the matter. The Court will withdraw the question to which Mr. Bearman's objection is made, and will simply ask this question, with permission of counsel, or consent of counsel:

Q. Mr. Poyet, to your knowledge was there any escrow other than the one already mentioned pending at about the time with which we are concerned here in which Charles E. Hill was in any way a party? Now, you must answer that question "Yes" or "No". A. Yes.

The Referee: All right, counsel, do you want to proceed from there?

Mr. Gendel: Yes, your Honor.

Q. (By Mr. Gendel): Did this pending escrow the Court has referred to in his question have anything to do with the escrow as described in Trustee's Exhibit No. 4?

Mr. Bearman: That is objected to, if your Honor please, on two grounds; first: upon the ground that it is purely hearsay, and not the best evidence. If there are any such instructions they are the best evidence.

(Testimony of Henry F. Poyet.)

The Referee: Yes, that objection is good, Mr. Gendel. The witness has been permitted to state whether or not there was an escrow in which Mr. Hill had an interest, he having said "Yes" that there was, and now it is incumbent upon you to show by the original papers what that escrow was and what Mr. Hill's connection with it was.

Mr. Gendel: I don't want to encumber the record with a great deal of shadow boxing, but I would like to point out to the Court that in the Answer by Jennie Wuchner to the Complaint filed by Charles E. Hill and Dora M. Hill in the Superior Court of the State of California, in and for the County of Los Angeles, on page 10 in paragraph 11, Mrs. Wuchner admits receiving these "Escrow Instructions No. 32" but which Mr. Bearman stated he never saw before, and admits returning them, as shown here in the letter of February 14th, Trustee's Exhibit No. 4, and that is the question we are concerned with where there has been a tender, and Mr. Hill didn't need to have \$4912.63 or four cents in the bank if that is the situation.

The Referee: You are the one going forward with the examination of this witness, Mr. Gendel, and if you do not feel that it is a proper question you may abandon it.

Mr. Gendel: Well, Mr. Poyet, the witness, was handling these escrows, and he knows whether he had these dealings and whether this money was on deposit, but did he have under his control as the head of this escrow company—the Angeles Escrow

(Testimony of Henry F. Poyet.)

Service Company—the \$4912.63? However, I don't think we are concerned with the ancillary escrows by which that money would be available, because Mrs. Wuchner refused the tender.

Mr. Bearman: I move to strike that statement out.

The Referee: Yes; that is not evidence; that is a statement by counsel. Now, we are not deciding the legal question, but ruling on the evidence. Proceed.

Q. (By Mr. Gendel): Do you have with you the copy of the escrow instructions?

A. I do, but I will have to look for them in my file.

The Referee: We will take a short recess.

(Immediately following the ten-minute recess the hearing was resumed:)

Q. (By Mr. Gendel): Now, Mr. Poyet, you have gone through some of your various escrow papers, have you? A. Yes, I have.

Mr. Bearman: Without trying to be facetious, is he now testifying as President of the Escrow Service Company, or as an attorney?

Mr. Gendel: He is testifying to matters within his own knowledge, Mr. Bearman.

The Referee: All right; proceed; gentlemen.

Q. (By Mr. Gendel): Now, Mr. Poyet, you have shown to counsel for both sides a memorandum on the heading of the Angelus Escrow Service Company, dated February 11th, 1946. A. Yes.

(Testimony of Henry F. Poyet.)

Q. Is that the money referred to heretofore by you as being available for the payment of the tender?

Mr. Bearman: Before answering that question, Mr. Poyet, I interpose the objection that it is incompetent, irrelevant and immaterial, and is calling for the conclusion of this witness, your Honor.

The Referee: Overruled. Answer the question.

A. Yes.

Q. (By Mr. Gendel): Tell us what this document of February 11th, 1946, is.

Mr. Bearman: I object to the question on the ground that the document speaks for itself.

The Referee: Objection sustained.

Q. Does that document bear the signatures of Frank Bruno and Teddy Berg? A. It does.

Q. Was it signed by them in your presence?

A. It was.

Q. Was it signed on February 11th, 1946?

Mr. Bearman: We object. The document speaks for itself.

The Referee: The objection is overruled.

A. Yes, it was signed on that date.

Q. Do you recognize the signature on here: "Charles E. Hill by Dora M. Hill, His Attorney in Fact" as being the signature of Mrs. Hill?

A. I do.

Q. Was that, likewise, signed February 11th, 1946? A. It was.

Mr. Gendel: I now ask that this document re-

(Testimony of Henry F. Poyet.)

ferred to and dated February 11, 1946, be introduced as the Trustee's next exhibit in order.

Mr. Bearman: I object to it on two grounds; first, that it is incompetent, irrelevant and immaterial; and that no foundation has been laid to show that she had any authority to sign for Charles E. Hill.

Mr. Gendel: That doesn't make any difference, anyway, counsel.

Mr. Bearman: I don't see why not.

Mr. Gendel: I am not questioning the authenticity of the power-of-attorney here. The wife, Dora M. Hill, was acting for the husband, who was confined in San Quentin. I don't think that is a question here.

Mr. Bearman: But you are introducing a certain document signed not by that person Charles E. Hill, but by someone who purports to have a certain agency.

Mr. Gendel: That is a matter for cross-examination.

Mr. Bearman: No, it is not, and my objection is that no proper foundation has been laid.

Mr. Gendel: And that is not the score; the question was whether that is her signature and signed by her on that date, and his answer to that question was "Yes."

Mr. Bearman: I will interpose my objection.

The Referee: The objection is overruled, and the instrument is received in evidence as Trustee's Exhibit No. 5.

(Testimony of Henry F. Poyet.)

Its legal effect is a matter for the Court to determine.

TRUSTEE'S EXHIBIT No. 5

[Letterhead Angelus Escrow Service Company]

In Reply Refer to Escrow No. 32.

Escrow Officer: H. F. Poyet.

February 11, 1946.

Angelus Escrow Service Corporation.

Referring to the escrow instructions of Charles E. Hill in the above numbered escrow which instructions are made a part of this instruction by reference, we the undersigned hand you the sum of \$4912.63 which you are to use when you can comply with the foregoing instructions of Charles E. Hill purchasing the property therein described free of liens or encumbrances as therein set forth and in addition thereto you will record for us concurrently with the deed from Mrs. Jennie Wuchner to Charles E. Hill a deed from Charles E. Hill and Dora Hill his wife to Frank Bruno and Teddy Berg to the above described property you will have the title showing free and clear of encumbrances said property in Frank Bruno and Teddy Berg.

We are also handing you herewith \$202.45 with you are authorized to pay to the County Tax Collector of Los Angeles County on account of the Tax sale of the machinery of Charles E. Hill at 732 Pacific Avenue, Redono Beach, California. You are authorized to pay this money out of funds deposited

(Testimony of Henry F. Poyet.)

with you regardless of the condition of title and without any liability to you.

/s/ FRANK BRUNO,

/s/ TEDDY BERG.

I, Charles E. Hill, agree to execute the deed in accordance with the foregoing instruction and agree to comply therewith.

CHARLES E. HILL,

By /s/ DORA M. HILL,

His Attorney in Fact.

Q. (By Mr. Gendel): Did Mrs. Hill have a written power-of-attorney affecting this property permitting her to sign on behalf of Mr. Hill?

Mr. Bearman: Of his own knowledge? We object to that.

The Referee: You are asking about the contents of a written instrument.

Mr. Gendel: I have to find out about its contents before I can introduce it.

The Referee: Objection sustained.

Q. Have you in your possession the executed power-of-attorney, Mr. Poyet?

A. I believe we have.

Q. Will you produce it, please?

A. Yes. Mrs. Hill will be here in a moment and she can find it.

Mr. Gendel: All right, then; that is all at this time, Mr. Poyet.

(Testimony of Henry F. Poyet.)

The Referee: Have you any questions, Mr. Bearman?

Mr. Bearman: Now, Mr. Gendel, will you object to all these questions I am going to ask him?

Mr. Gendel: Which ones, Mr. Bearman?

Mr. Bearman: No questions.

The Referee: Stand aside, Mr. Poyet.

Mr. Gendel: I want to ask Mrs. Hill: Do you have here your power-of-attorney to sign for your husband, Mr. Charles E. Hill?

Mrs. Hill: Yes.

Mr. Gendel: Will you please find it for us?

Mrs. Hills: Yes.

Mr. Gendel: By the way, Mr. Bearman, will it be necessary to produce Mrs. Hill to testify that she mailed the letter of February 11th, 1946, and that it had in it the escrow instructions and the statement of identity, the one you——(interrupted).

Mr. Bearman: What did you say?

Mr. Gendel: Will it be necessary to have Mrs. Hill testify that she did mail the envelope to Mrs. Wuchner containing the letter of February 11th, the escrow instructions and the statement of identity?

Mr. Bearman: No, we stipulate to that.

(At this juncture Mr. Gendel exhibited a paper to Mr. Bearman.)

Mr. Bearman: Is that from the Escrow Department, or is it from the Legal Department?

Mr. Gendel: This is from her private, personal papers.

Mr. Bearman: I was trying to differentiate as between the two, that is, whether Mr. Poyet is the Escrow Officer or the Legal Department here.

Mr. Gendel: Mrs. Hill, will you take the witness stand and be sworn, please?

DORA M. HILL

called as a witness on behalf of the Trustee, and having been first duly sworn by said Referee in Bankruptcy, testified as follows:

The Referee: Your name, please?

The Witness: Mrs. Dora M. Hill.

Mr. Bearman: Just to save time, I think it might be stipulated that there has been shown to me an instrument designated: "Power-of-Attorney From Charles E. Hill of Rendono Beach, California," in which he appoints "Dora M. Hill, My Wife" of the same place "My Attorney for Me and in My Name and For My Use and Benefit," and it is dated the 6th day of November, 1945, there being the signature on here "Charles E. Hill" and if Mr. Gendel states that is the signature of Mr. Hill I will so stipulate; and on the reverse side of this instrument they have—the instrument I have just referred to, there appears a jurat designated: "State of California, County of Los Angeles," in which it states: "Personally appeared Charles E. Hill before Belle H. Wingers, Notary Public," and I will stipulate that that is the power-of-attorney in question, but with this further provision, that is, that the power-of-attorney which I have referred to

(Testimony of Dora M. Hill.)

doesn't bear anywhere upon any part of the instrument any indicia showing that the instrument is recorded.

Mr. Gendel: I think, to complete the record here, we will introduce the power-of-attorney, with the stipulation that we may substitute a copy, because I think this is the only executed copy.

The Referee: Why is it necessary to take this instrument away from this lady, counsel having stipulated to it?

Mr. Bearman: And I have described it very fully, so that there should be no question about it.

Mr. Gendel: Very well.

Mr. Bearman: And if necessary I will substitute a copy of it.

The Referee: You have stated, Mr. Bearman, that it is a full power-of-attorney.

Mr. Glendel: Yes.

Mr. Bearman: Yes, your Honor.

The Referee: And that is sufficient as to that. Is that all for this witness?

Mr. Gendel: Yes.

Mr. Bearman: I have no questions.

Mr. Fowler: Mr. Heffren, will you take the stand and be sworn, please.

M. J. HEFFREN

a witness called on behalf of the Respondent Jennie Wuchner, and said witness having been first duly sworn by said Referee in Bankruptcy, testified as follows:

The Referee: What is your name?

The Witness: M. J. Heffren.

Direct Examination

By Mr. Fowler:

Q. Mr. Heffren, where do you reside?

A. In Venice, California.

Q. Do you know Mrs. Jennie Wuchner?

A. I do.

Mr. Fowler: May I see the notice dated February 5th, your Honor? It was introduced as an exhibit here.

The Referee: Yes.

Q. (By Mr. Fowler): I show you a notice dated the 5th day of February, 1946, signed: "Mrs. Jennie Wuchner" and ask you if you have ever seen that notice before? A. Yes; I saw her sign it.

Q. And did you do anything with that notice after you saw Mrs. Wuchner sign it?

A. Yes; I took it to the postoffice and mailed it to Charles E. Hill.

The Referee: Gentlemen, isn't it admitted the notice was received in due course.

Mr. Fowler: This is in reference to Mrs. Hill.

The Referee: Isn't it also stipulated that Mrs. Hill received the notice?

(Testimony of M. J. Heffren.)

Mr. Gendel: Yes, the only thing is as to the date on which she received it.

The Referee: Can't you stipulate on that now? She is present.

Mr. Gendel: But she doesn't know the date she received it. She doesn't remember the date.

The Referee: Then, what date did you put this notice in the postoffice?

A. I put it in the postoffice on the 5th day of February, 1946.

Q. (By Mr. Fowler): Did you ever deliver personally a copy of that notice to Mrs. Hill?

A. I did.

Q. On what date?

A. On February 6th, 1946 at about one o'clock.

Mr. Fowler: That is all.

The Referee: Have you any cross-examination of this witness?

Mr. Gendel: None.

Mr. Fowler: That notice of February 8th was mailed from our office, and Mrs. Bearman mailed it, if they want to so stipulate.

Mr. Gendel: Do you mean that a copy of it was mailed to Mrs. Hill as well as to Mr. Hill?

Mr. Bearman: Yes.

Mr. Gendel: If you stipulate that is correct, then I so stipulate.

Mr. Bearman: That is right.

Mr. Fowler: Yes, that is correct.

Mr. Glendel: Then I so stipulate.

The Referee: Anything else, gentlemen?

(Testimony of M. J. Heffren.)

Mr. Bearman: Well, your Honor please, I think we have covered everything by way of the stipulations and by way of the testimony that has been introduced, I think we have covered everything by way of facts. Of course, there are the legal questions that may be raised. However, we rest at this time.

The Referee: There is one item that has not been covered in the evidence, and that is the condition of this contract at the time of the demand for payment in full, except it has been stipulated that the contract is in default; but I don't think that is sufficient.

Mr. Bearman: I thank you, your Honor, and I will state at this time that I understand there was a stipulation entered into, and I think I made the statement stating that if you computed it in that fashion I think that is correct; and Mr. Gendel stated that there is \$4912.63—(interrupted).

Mr. Gendel: No, the question by the Court now is just what defaults there were at that time, and I think I made the statement there were two defaults at that time, in the payments.

The Referee: I think that is in the record, but the course of dealing between them should be in the record here. I see that there is attached to Trustee's Exhibit No. 1 here a list of payments that were made, which, of course, is a part of the record; but whether it is complete or not the Court doesn't know, and I shall read it (reading): under the caption "Date Paid" appears the figures "7-1-45" and in the same line with those figures and under the

(Testimony of M. J. Heffren.)

caption "Balance of Prin. Unpaid" there appears the sum of "\$5500.00" and under the caption "Date Paid" appears the figures "7-2-1945"; under the caption "Amount Paid" in the same line is "\$350.00"; under the caption "Credit on Principal" in that same line "\$350.00"; and under the caption "Balance of Principal Unpaid" in the same line we find the figures "\$5150.00"; and the next and last entry on this statement of payments is the following: "7-1-45" under "Date Paid" and under the caption "Date Due" appear the figures "8-1-45" and under the caption "Amount Paid" in this line is "\$200.00" and under the caption "Credit on Interest" we find the figures "25.75" and under the caption "Credit on Principal" the figures "\$174.25"; under the caption "Balance of Principal Unpaid" are the figures "\$4975.75" and there the record ends.

Mr. Gendel: Apparently there was one other payment made and they released it.

The Referee: Can you stipulate as to when that payment was made, and how it was credited?

Mr. Fowler: There was also another payment made under date of September 1st, 1945—I will read from this memorandum which shows: "Date paid, 9-1-45; Date due, 9-1-45; Amount paid, \$200.00; interest, \$24.88, principal, \$175.25; balance principal, \$4800.63," and we so stipulate. Now, will you stipulate, Mr. Gendel, that was the last payment made on this contract?

(Testimony of M. J. Heffren.)

Mr. Gendel: We so stipulate, and the memorandum you have read would probably end our problem up to September 1st, 1945, because it shows: "Date due, 9-1-45" and "Date paid, 9-1-45."

The Referee: The contract provides for the payment of \$5500.00, and the contract is dated the 5th day of June, 1945.

Mr. Fowler: That is correct.

The Referee: The contract provides for the following payments: "\$350.00 upon the execution and delivery of this Agreement, receipt of which is hereby acknowledged, and the further sum of Two Hundred Dollars (\$200.00) or more on or before the first day of each calendar month thereafter until the sum of Fifteen Hundred Dollars (\$1500.00) shall have been paid on the principal sum, together with interest thereon at the rate of 6% per annum. Each payment shall be credited first on interest then due and the remainder on principal; and interest shall thereupon cease upon the principal so credited. Should default be made in payment of any installment when due the whole sum of principal and interest shall become immediately due at the option of the Seller. If action be instituted on this contract, Buyer to pay such sum as the Court may fix as attorney's fees whether such action progress to judgment or not." Now, it may or may not be important to determine whether or not the Seller has waived the proposition that time was of the essence of the contract. As I say, the contract appears to be dated June 5th, 1945, and it

(Testimony of M. J. Heffren.)

calls for the immediate payment of \$350.00, and yet the record we have here shows that payment of the \$350.00 was made on July 2nd, 1945, and the contract provides for a payment on the 1st day of July of \$200.00 which appears not to have been made—wait a minute—yes, there was a \$200.00 payment on July 1st but it was credited, apparently, on the payment due August 1st, 1945. Then the only other payment was made September 1st for the September 1st installment. Query: What became of the \$200.00 that was due July 1st, and was or was not any payment made on August 1st. Now, also, gentlemen, from our general experience we know that sometimes the holder of a contract in making entries or record of payments puts down as the date of payment the due date, when, as a matter of fact, the payment was received five, ten, fifteen or twenty days after that date, and it may or may not be important to get all of these exact facts into the record, because it may be necessary to determine whether this Seller has waived the proposition that time is of the essence of the contract.

Mr. Gendel: I have made inquiry of Mrs. Hill as to what took place, and if necessary I will put her on the witness stand—and I will make the preliminary statement, which is not testimony, but she states that—(interrupted).

Mr. Bearman: Just a moment.

The Referee: I am not going to insist that anybody put in any further testimony or any further evidence, but unquestionably, Mr. Gendel, you are

confronted with the question that time is of the essence of the contract.

Mr. Gendel: Well, I will have Mrs. Hill take the witness stand on behalf of the Trustee.

DORA M. HILL

a witness on behalf of the Trustee, and having been duly sworn by said Referee in Bankruptcy, testified further as follows:

Direct Examination

The Referee: You have been sworn, Mrs. Hill.
By Mr. Gendel:

Q. I will first ask you, do you have any personal knowledge of just when these various payments that have been credited against the contract here were made?

Mr. Bearman: I object to the question unless she knows of her own personal knowledge.

The Referee: Objection overruled. The question calls for a "Yes" or "No" answer. Do you have such knowledge?

Mr. Bearman: I withdraw my objection.

A. No, I can't state definitely when it was.

Q. After September 1st, 1945, did you have any conversations with the Seller concerning the payments required by the sales contract?

Mr. Bearman: I object, unless it is preliminary, and unless you fix the time.

Mr. Gendel: It is preliminary.

The Referee: Tell us whether or not you had any conversation with Mrs. Jennie Wuchner?

(Testimony of Dora M. Hill.)

A. No, not with her, but with her son.

The Referee: What is his name?

A. Norman Wuchner.

Q. (By Mr. Gendel): Is he the one you dealt with in this transaction?

A. Yes, all the way through.

Q. When was the first time after September 1st, 1945 that you talked with Mr. Norman Wuchner concerning the payments required under this contract.

Mr. Bearman: I would like to have that question read.

(The reporter read the question.)

Mr. Bearman: I object to the question on the grounds that it is incompetent, irrelevant and immaterial, and it is calling for the conclusion of this witness; and the further ground that it is clearly shown here that the parties to this contract and to this controversy are Jennie Wuchner and Charles E. Hill and Mrs. Hill, and the other would be hearsay insofar as it would affect Mrs. Hill, that is, insofar as whatever Mr. Wuchner did.

The Referee: The objection is overruled. She may answer that question.

(Question read by reporter.)

A. I don't know the exact date, but it was around the latter part of September, 1945.

Q. Where were you at the time you talked to him?

A. I was at the shop.

Q. Mr. Norman Wuchner came to the shop, did he?

A. Yes, frequently.

Q. Who else was present at that time?

(Testimony of Dora M. Hill.)

A. I don't recall anybody else being present.

Q. What time of day was it?

A. I imagine it was in the afternoon, but I can't say for sure that it was in the afternoon.

Q. What was said by you, and what was said by Mr. Norman Wuchner, concerning the subject matter of payments on this contract?

Mr. Bearman: I object to the question on the ground that no foundation has been laid, and any testimony offered here by her would not affect the rights of Mrs. Jennie Wuchner. It is hearsay.

The Referee: There is no showing that Mr. Norman Wuchner was authorized to speak for his mother. I think the objection is good.

Mr. Gendel: She testified that all of the dealings of the Hills in this transaction were with Mr. Norman Wuchner, and Mrs. Wuchner would be bound by that, just the same as by Mr. Bearman's transactions in this matter.

The Referee: In order to save time I will let the evidence go in and then determine its legal affect, whether or not it is binding on the seller and Mr. Hill. The objection is overruled.

Mr. Gendel: I think, in view of the objection, that I would like to back up just a bit to the extent of getting in a little more of the background as to Mr. Norman Wuchman's dealings here.

The Referee: Go ahead.

Q. Were you with Mr. Hill when the original sale was negotiated?

A. No, but I knew about it.

(Testimony of Dora M. Hill.)

Q. Were you present at any time when Mr. Hill was working with the Wuchners on the transaction of the purchase of this property?

Mr. Bearman: She said she knew about it, and unless she was there—(interrupted).

Mr. Gendel: That is what I asked her, if she was present when Mr. Hill was working on the transaction.

The Referee: Let her answer the question, whether she was there.

A. Yes, and I knew all about it, all about the sale, and I talked with both of them and I was present when they talked over the sale.

Q. Was Mrs. Jennie Wuchner a party to any of these discussions with Mr. Hill?

Mr. Bearman: I object to the question on the grounds that it is incompetent, irrelevant and immaterial.

The Referee: Objection overruled.

A. At no time.

Q. At any time did Mrs. Jennie Wuchner take part in the collection of these payments?

Mr. Bearman: The same objection.

A. No.

Q. How were these collections actually paid?

A. By checks to Norman Wuchner, and they were made out in his name.

Q. Did he come down to the plant to collect the payments? A. Yes, always.

(Testimony of Dora M. Hill.)

Q. That is what happened so far as the payments were concerned that were actually made?

A. Yes, that is right.

Q. Tell us what was said in the conversation in the latter part of September, 1945 concerning these payments?

Mr. Bearman: May I record the same objections to all of this line of testimony; incompetent, irrelevant and immaterial and not binding upon Mrs. Wuchner, and no foundation laid, your Honor.

The Referee: Overruled. Proceed.

Mr. Bearman: That is not the proper way to show agency, and it is purely hearsay.

The Referee: Overruled. Answer the question.

Mr. Gendel: Did you understand the question?

The Witness: I think so.

Mr. Gendel: Just answer the question, which is: What did you say and what did Mr. Norman Wuchner say on the subject of payments on this contract?

A. Well, Mr. Gendel, I don't recall talking to him about payments in September, 1945.

Q. When was the first time you talked to him about the subject matter of payments on this contract?

A. It must have been in October, when the next payment was due. I am pretty sure that is when it was.

Q. When and where did that conversation take place?

(Testimony of Dora M. Hill.)

A. All the conversations about it took place in the office of the shop there.

Mr. Bearman: I move to strike the answer that "all the conversations about it took place in the office of the shop."

The Referee: The motion is denied. Proceed.

Q. About what time in the month of October, 1945, did you have your first conversation concerning the subject matter of payments on this contract?

A. I would say around the middle of the month of October.

Q. About the middle of October, 1945?

A. Yes, it was about that time. I couldn't say the exact date for sure.

Q. That is your best recollection now, is it?

A. Yes, it is.

Q. And was that at the shop?

A. Yes, in the office down at the shop.

Q. Do you recall whether or not anybody else was present there at that time? A. No.

Q. Do you recall what time of day it was?

A. No, I don't.

Q. What was said by you and what was said by Mr. Norman Wuchner at that time on the subject matter of payments on this contract?

Mr. Bearman: Now, when was that, Mr. Gendel?

Mr. Gendel: In the middle of October, 1945.

The Witness: What was said then?

Mr. Gendel: Yes. Can you give us the general conversation, please?

(Testimony of Dora M. Hill.)

A. Well, as much as I recall now I mentioned that I might be late with the payments then, because I was kind of upset by everything else that had happened; and he told me not to worry about it.

Q. Do you recall just what he said about it?

A. Yes, I do. He said: "Don't worry; we can work something out; I am not interested in having all of the money at one time, I want the interest on it over a time for my mother's income."

Q. Is that the substance of what was said at that time? A. Yes.

Q. When was it discussed the next time?

A. I don't know. He was there practically every day, or just about every day. It is hard to say what day it was.

Q. It is now your testimony that this type of conversation took place several times after October, 1945?

Mr. Bearman: I object to that as leading and suggestive.

The Referee: Sustained. Proceed.

Mr. Gendel: I don't know what is leading and suggestive about it.

The Referee: By your putting the words in her mouth in your question. Proceed.

Q. Well, how often did you have a conversation with Mr. Norman Wuchner concerning the matter of payments on the sales contract after the first conversation you have testified about or testified to which you say was around the middle of October, 1945?

(Testimony of Dora M. Hill.)

A. It would be hard to say, because I saw him so much and so many times, and I couldn't state definitely and tell the truth about it.

Q. Did it ever happen after the middle of October, 1945?

A. Yes, up until the first of the year when I closed the shop.

Mr. Bearman: I don't think he should word his questions that way.

The Referee: Proceed.

Q. When was the next occasion that you recall after the middle of October, 1945, that you had on the subject matter of payments on the contract?

A. I just can't state dates, because I don't remember what dates they were. When you see somebody every day you can't say which particular date a certain thing was said.

Q. (By the Referee): Try it this way, Mrs. Hill: There were some notices given in this matter in February, 1946, what was the last time before any of those notices were given that you had a conversation with Mr. Norman Wuchner?

A. It was before the first of the year; I know that.

Q. You have no recollection of having any conversation with him since that?

A. None that I recall.

Q. How long before January 1st, 1946, was it that you had your last conversation with Mr. Norman Wuchner?

(Testimony of Dora M. Hill.)

A. It was just a week before Christmas, was the last time I talked to Mr. Norman Wuchner before January 1st.

The Referee: Go ahead, Mr. Gendel.

Q. (By Mr. Gendel): On this last occasion that you had a conversation with Mr. Norman Wuchner, what did he say to you about the payments.

A. He didn't say anything about payments then. He was talking about fixing the roof and fixing the building, and we had laid a foundation in the back and he was talking about building a building on that.

Q. Other than what you have just told us when was the last time you had a conversation with Mr. Norman Wuchner involving the subject matter of making payments on the contract?

A. There wasn't any conversation about it after (pause)—well, it would be after the meeting in October when I talked to him. I talked to him several times but he never did press me in any way about the payments; and I told him about the circumstances I was in, and he knew about that.

Q. (By the Referee): What did you tell him about your circumstances?

A. I didn't really tell him anything about them, because he knew all about them.

Mr. Bearman: I move that the answer be stricken out.

Q. (By the Referee): Did anything unusual occur in your family in the latter part of September, 1945?

(Testimony of Dora M. Hill.)

A. Yes—and do I have to go through with that again?

Q. (By the Referee): Well, I am sorry. However I think that it may or may not be material, and no matter how distressing it may be to you I think we should get it into the record. What did happen?

(Witness began crying, inaudibly.)

Mr. Bearman: I was going to say I will be glad to stipulate as to that and cover it by stipulation.

The Referee: Can you stipulate that in the latter part of September, 1945, he was arrested, that is, Mr. Hill was arrested?

Mr. Poyet: Yes, he was arrested, tried and I think the conclusion of the trial was in December, 1940; I think it was December 24th, 1945, and sentence was passed by Judge Fricke on January 8th, 1946.

The Referee: But when did it start?

The Witness: September 23rd was when he was arrested.

The Referee: Was he incarcerated?

Mr. Poyet: Yes, and charged with a felony.

The Referee: Is that stipulated?

Mr. Poyet: Yes.

Mr. Gendel: Yes, so stipulated.

Mr. Bearman: So stipulated.

The Referee: The only important thing left is whether or not Mr. Norman Wuchner had any knowledge of that situation, and if so, when he ascertained such knowledge.

(Testimony of Dora M. Hill.)

Mr. Bearman: I don't know anything about that.

Mr. Poyet: It was in the newspapers.

The Referee: That wouldn't help us any.

Mr. Gendel: I think Mr. Bearman will find that if there are any of the members of the family here they knew about it.

Mr. Bearman: I know there was some sort of difficulty that Mr. Hill was involved in, but I don't know anything about the details, and I think that possibly this will cover Mr. Gendel's inquiry, that is, that Mr. Hill was involved in something and he was charged with a felony, and that all of the residents of the particular locality where Mr. Wuchner lived and where Mr. and Mrs. Hill lived knew of this particular thing.

Mr. Gendel: Did you say including Mr. Norman Wuchner?

Mr. Bearman: I think so.

The Referee: All right; is that sufficient?

Mr. Poyet: And that by reason of that fact Mr. and Mrs. Hill were compelled to make immediate financial arrangements to raise money.

Mr. Bearman: That is not necessary.

The Referee: No.

Mr. Bearman: And I move to strike that out.

The Referee: Yes, that may go out.

Mr. Gendel: So stipulated.

Q. (By the Referee): Mrs. Hill, you testified that shortly before Christmas of 1945, Mr. Norman Wuchner was on the premises in question here and

(Testimony of Dora M. Hill.)

that you had some conversation with him in the course of such things as putting on a roof; can you recall that conversation more specifically as to what was said by the two of you?

A. Well, not much, except he did mention about putting up the walls for a new building on the back where the new station is; and I knew he had been working on the roof, he had a man working on it.

The Referee: I am confused about that. I thought we had a contract here where Mr. Hill was buying this property from Mrs. Wuchner, and now they are talking about making improvements on it.

Mr. Bearman: Yes, just like if you had a home in Los Felis Heights and I was going to put certain improvements on it——

Mr. Gendel: I don't think that is material. There is no question about possession here.

Mr. Bearman: No, but I think your Honor's observation is a good one.

Q. (By the Referee): I want to ask you, Mrs. Hill, after your husband entered into this contract and went into possession of this property did he start to make some improvements on it and put up a building? A. Yes.

Q. How far along did he go with that?

A. We had the excavation work in, and there was a cement floor and a foundation laid of twenty-five feet by something, I don't know just the area, but it was kind of an odd shape, on the back of the building there.

(Testimony of Dora M. Hill.)

Q. How far did he get with it—your husband?

A. Just the foundation and the floor.

Q. What was it intended for?

A. There was an automatic screw machine in there and we were going to move that out so we could have room for something else on the inside there.

Q. Did Mr. Wuchner do any of that work on the new small building? A. No.

Q. He didn't?

A. No; we did all of it.

Q. I thought you said he had done something there.

A. No, not on that; but after he found out I was in difficulty he turned about and started putting a new building up, there.

Q. But he never did cause any work to be done on this new building you mentioned?

A. No, he didn't.

Q. And he didn't do any work on it himself?

A. No.

The Referee: Any further questions, gentlemen?

Mr. Gendel: None by the Trustee.

Mr. Bearman: No questions. Now, your Honor, at this particular time I move to strike all of the answers and all of the testimony that has been offered by this witness concerning Norman Wuchner, on the ground that insofar as Jennie Wuchner, who is the plaintiff in the action that I have referred to, and is the same person involved in this particular action, that it is in no way binding on her,

and that there has been no testimony offered showing an agency or any right on the part of Norman Wuchner to bind Mrs. Jennie Wuchner.

The Referee: No; I think your motion should be denied, because I think these conversations with Mr. Norman Wuchner are a part of all the circumstances surrounding the case. The question of whether or not they are binding on Mrs. Wuchner is a legal question for the Court to decide from all of the evidence. Is there anything further?

Mr. Gendel: The Trustee rests.

Mr. Bearman: I think we have no questions.

The Referee: Is there anything further? (No response.) You say that you are all through, Mr. Gendel?

Mr. Gendel: Yes, your Honor.

The Referee: Mr. Poyet, have you any evidence?

Mr. Poyet: We have no further evidence, your Honor.

The Referee: Mr. Bearman?

Mr. Bearman: We rest, your Honor.

* * * * *

[Endorsed]: No. 11878. United States Circuit Court of Appeals for the Ninth Circuit. Jennie Wuchner, Appellant, vs. George T. Goggin, Trustee in Bankruptcy of the Estate of Charles E. Hill, Doing Business as Hill Machine Tools, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed March 8, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

Circuit Court of the United States
for the Ninth Circuit

No. 11878

In the Matter of
CHARLES E. HILL, dba HILL MACHINE
TOOLS, No. 44347-W,

Bankrupt.

JENNIE WUCHNER,

Appellant,

vs.

GEORGE T. GOGGIN, Trustee,

Appellee.

POINTS TO BE RELIED UPON BY
APPELLANT ON APPEAL

Point I.

In a real estate contract of sale where time is made essential and payment is to be made not later

than a specified date the forfeiture resulting from not making such payment is completed on that date.

Point II.

An intention to forego or abandon a right is an essential element of waiver.

Point III.

Waiver, if relied upon, must be pleaded and proved.

Point IV.

Before any party to an obligation can require another party to perform, he must first show that he has performed all conditions precedent required of him by the contract.

Point V.

An offer of performance must be made by debtor, or by some person on his behalf and must be free from any condition which creditor is not bound on his part to perform, and debtor must be able and willing to so perform.

Point VI.

That when a contract for sale of real estate provides that a violation of any of its terms or conditions shall work a forfeiture, it means that all rights of the party violating it shall cease but it remains in force to protect the rights of the innocent party and to enforce obligations of the delinquent.

Point VII.

The Bankruptcy Court was without jurisdiction to try this matter in a summary proceeding as there were two actions pending in the State Court

involving the same property and the same parties at the time Petition in Bankruptcy was filed.

Point VIII.

Trustee never acquired possession of this property, actual or constructive. Bankrupt's rights had been forfeited and any possession claimed by him or by the trustee was without any legal right and at most was that of a trespasser. Bankruptcy Court does not have jurisdiction over property of a stranger to the proceedings where trustee does not have actual or constructive possession.

Point IX.

That the order of the Referee and the Findings of Fact and Conclusions of Law entered by him and the order of the United States District Judge confirming said Order and Findings of Fact and Conclusions of Law are contrary to the evidence not supported by the evidence and that said Findings of Fact and Conclusions of Law and said Order are illegal, unconstitutional and improper and not in accord with the law and facts in this case.

Respectfully submitted,

WILLIAM W. BEARMAN,

RAYMOND B. McCONLOGUE.

By /s/ R. B. McCONLOGUE,

Attorneys for Appellant.

[Affidavit of service by mail attached.]

[Endorsed]: Filed March 8, 1948.



No. 11878

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JENNIE WUCHNER,

Appellant,

vs.

GEORGE T. GOGGIN, Trustee in Bankruptcy of the ESTATE
OF CHARLES E. HILL, Doing Business as HILL MA-
CHINE TOOLS,

Appellee.

APPELLANT'S OPENING BRIEF.

WILLIAM W. BEARMAN,
RAYMOND B. McCONLOGUE,
306 Taft Building Los Angeles 28,
Attorneys for Appellant.

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No. 11878

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JENNIE WUCHNER,

Appellant,

vs.

GEORGE T. GOGGIN, Trustee in Bankruptcy of the ESTATE
OF CHARLES E. HILL, Doing Business as HILL MA-
CHINE TOOLS,

Appellee.

APPELLANT'S OPENING BRIEF.

Jurisdictional Statement.

On April 1, 1946 an Involuntary Petition in Bankruptcy was filed against Charles E. Hill, doing business as Hill Machine Tools, in the United States District Court, Southern District of California, Central Division, alleging that said Hill could become a bankrupt under Section IV of the Bankruptcy Act. [Tr. 2-3-4.] The proceeding was referred to Benno M. Brink, Referee in Bankruptcy, on April 5, 1946 [Tr. 7], and on the first day of May, 1946, said Charles E. Hill was adjudicated a bankrupt. [Tr. 8.]

On June 26, 1946, George T. Goggin, the duly elected Trustee in Bankruptcy of said Hill, filed an Amended Petition to Show Cause *re* Jennie Wuchner [Tr. 15-16],

and on July 3, 1946, Benno M. Brink, Referee, entered an order directing Jennie Wuchner to appear and show cause why prayer of Amended Petition of Trustee should not be granted. [Tr. 21.] Jennie Wuchner appeared and filed answer to Trustee's petition, setting up as an affirmative defense the lack of jurisdiction of the Referee to proceed in the matter. [Tr. 22-23-24.] After a trial, the Referee entered its Findings of Fact and Conclusions of Law and Order [Tr. 34-45, incl.] granting prayer of Trustee's petition. On January 8, 1947, Jennie Wuchner filed her Petition for Review of Referee's Order by Judge. [Tr. 46-61, incl.] After hearing, and on December 16, 1947, Honorable Jacob Weinberger entered his order denying Petition for Review [Tr. 62] from which this appeal is taken. On December 16, 1947, Jennie Wuchner filed her Notice of Appeal and bond for cost. [Tr. 63.]

This Honorable Court has jurisdiction to review the Order of Judge Weinberger under provisions of U. S. C. A., Title 28, Section 228, Subsection A.

Statement of the Case.

On June 15, 1945, Jennie Wuchner, appellant, entered into a real estate contract [Tr. 96-99 incl.] with bankrupt Charles E. Hill covering sale to Hill of an improved business property in Redondo Beach, California. The price was \$5,500.00, payable in monthly installments of \$200.00 each until \$1,500 and interest was paid, whereupon Jennie Wuchner, appellant, agreed to deed the property to Hill and take back a note secured by trust deed for the balance.

The contract provides that the making of the payments and the performance of other covenants on the part of

Hill is a condition precedent to performance on the part of vendor, Jennie Wuchner, appellant herein. Time is made the essence of the contract. Attached to the contract is a loose rider, signed by the parties, as follows: "It is further agreed that any default shall not become effective for thirty (30) days from the date of said default." [Tr. 100.]

Bankrupt Hill made only two of the monthly payments and on February 5, 1946 was in default for payments due October 1, 1945, November 1, 1945, December 1, 1945, January 1, 1946 and February 1, 1946. In addition, Hill failed to pay taxes due on said property. On February 5, 1946, appellant Wuchner notified Hill in writing [Tr. 101] that, there having been default in the payment of installments, the whole amount of the principal and interest was now due and unpaid in the sum of \$4,912.63 and demanded payment of the total sum forthwith. This notice was served on Hill in San Quentin Penitentiary, where he was then incarcerated. On February 8, 1946, Jennie Wuchner, appellant, served Hill with a notice that contract had been cancelled by reason of the default by Hill of the payment of the monthly installments. [Tr. 109.]

On February 11, 1946, Angelus Escrow Service Company of Redondo Beach, California sent a letter [Tr. 115-116] to appellant Jennie Wuchner referring to her demand of February 5, 1946, and enclosing in said letter escrow instructions for her to sign and statement of identity for her to sign and stating that there was on deposit with Angelus Escrow Service Company the amount of Jennie Wuchner's demand, "subject to the escrow instructions for clear title as therein set forth." [Tr. 115-123, incl.] This letter did not state that it was written

on behalf of the vendee, Hill, or that the Angelus Escrow Service Company had any right or authority to act for him or on his behalf.

On February 14, 1946, Jennie Wuchner returned to Angelus Escrow Service Company its original letter of February 11, 1946, and the escrow instructions attached thereto [Tr. 115] stating that non-compliance with the terms of the contract by Hill had caused same to be forfeited and cancelled.

Thereafter and on February 20, 1946, Jennie Wuchner filed an action in the Superior Court of Los Angeles County to quiet title and foreclosure of purchaser's rights in said property against Hill. No answer was, or has been, filed in this action. On February 27, 1946, Charles E. Hill and Dora Hill, his wife, filed an action against appellant, Jennie Wuchner, for declaratory relief. Jennie Wuchner filed an answer to this complaint and both actions are still pending in the State Court.

Thereafter and on April 1, 1946, an Involuntary Petition in Bankruptcy was filed against Hill [Tr. 2-5, incl.] and on June 26, 1946, G. T. Goggin, appellee herein, Trustee in Bankruptcy for said Hill, filed an Amended Petition for Order to Show Cause *re* Jennie Wuchner [Tr. 15-20, incl.] alleging that, on February 11, 1946, Hill did tender the full sum then owing on the contract, to wit, \$4,912.63, to Jennie Wuchner, and further alleging that she refused the sum so tendered and attempted to declare a foreclosure of said contract. The petition sets out the pendency of the two actions in the State

Court, but alleges that the issue determining title of the said property should be litigated before the Referee. The Trustee also alleged that, prior to filing the petition, he had tendered to Jennie Wuchner the sum of \$5,035.43, which was the amount of her demand of February 5, 1946, plus interest at six per cent up to July 6, 1946.

On July 3, 1946 the Referee issued an order [Tr. 21] directing Jennie Wuchner to appear and show cause why the prayer of Trustee's petition should not be granted. The appellant, Jennie Wuchner, filed her answer [Tr. 22-25] alleging that said contract had been cancelled and that said Hill had no rights thereunder, and denied all other allegations of the petition except the existence of the contract itself. She denied the right of the Referee to try or adjudicate the questions raised in the petition and, as an affirmative defense, alleged that the State Court, having acquired jurisdiction of the "*res*" and the parties, before the adjudication of bankruptcy, retained sole jurisdiction and the Bankruptcy Court had no jurisdiction of the within proceedings.

Over the objections of appellant as to the Referee's jurisdiction, the matter proceeded to trial before Benno M. Brink, Referee, on November 1, 1946. [Tr. 96-160, incl.]

The Trustee called two witnesses, Henry F. Poyet and Dora M. Hill. Poyet testified that Charles E. Hill, the vendee, sent him a copy of Jennie Wuchner's demand of February 5, 1946 from San Quentin Penitentiary and that he received it on February 6 or 7, 1946. He identi-

fied a letter sent by Angelus Escrow Service Company to Jennie Wuchner, appellant, on February 11, 1946 [Tr. 115-116] and testified that he enclosed in said letter, for her signature, escrow instructions and statement of identity. [Tr. 112.] The escrow instructions which were enclosed in the Angelus Escrow Service Company letter of February 11, 1946 and which Jennie Wuchner was required to agree to and sign contained numerous conditions to be performed by Jennie Wuchner before any money was to be paid to her. [Tr. 116 to 123, incl.] Among other conditions, she had to: (1) Sign the escrow agreement; (2) Agree that escrow could remain open until May 6, 1946; (3) Accept the sum of \$4,912.63 at some date after May 6, 1946, although said sum included interest on the unpaid principal only up to February 5, 1946; (4) Sign a statement of identity giving her residences and occupations during the past five years and a statement as to any former marriages [Tr. 124-125]; (5) Deposit a grant deed in the escrow, deeding said property to Hill, and (6) Secure and deposit in the escrow a policy of Title Insurance. Poyet, as President of Angelus Escrow Company, testified that the amount of Jennie Wuchner's demand of February 5, 1946 (\$4,912.63) was on deposit with the Angelus Escrow Service Company on February 11, 1946 and that the sole condition in connection with the payment of that money was obtaining a certificate of title insurance [Tr. 126], although the letter itself stated that the money was on deposit "subject to the escrow instructions for clear title as therein set forth." [Tr.

116.] On cross-examination, however, in response to a question by the Referee, "Was there in this particular escrow at the time in question the sum of \$4,912.63 to the credit of Charles E. Hill and subject to his order and deposition?" He replied, "We did not have it in this particular escrow—no." [Tr. 128-129.] On re-direct examination he testified that the money available for the payment of the tender was the money referred to in Trustee's Exhibit No. 5 [Tr. 136-137], which was a letter to Angelus Escrow Service Company under date of February 11, 1946 signed by Frank Bruno and Teddy Berg, which referred to and made a part of the letter the escrow instructions signed by Charles E. Hill which had to be signed by Jennie Wuchner. This letter stated in part [Tr. 136]:

"We, the undersigned, hand you the sum of \$4,-912.63 *which you are to use when* you can comply with the foregoing instructions of Charles E. Hill * * * and, in addition, you will record for us concurrently with the deed from Mrs. Jennie Wuchner to Charles E. Hill a deed from Charles E. Hill and Dora Hill, his wife, to Frank Bruno and Teddy Berg to the above described property. You will have title showing free and clear of encumbrances said property in Frank Bruno and Teddy Berg."

The witness, Dora M. Hill, testified over objection of appellant that she had a conversation with Norman Wuchner, son of appellant, about the middle of October, 1945. [Tr. 153.] She told him she might be late with payments

because she was upset by everything else that had happened, and he told her not to worry, that “we can work something out. I am not interested in having all the money at one time. I want the interest on it over a time for my mother’s income.” She testified she never talked with Norman Wuchner after the October meeting about the payments.

It was stipulated by counsel that Charles E. Hill, the vendee, was charged with a felony in September, 1945, that he was arrested, held in jail and, on December 24, 1945, sentenced to a long term in San Quentin Penitentiary. [Tr. 156-157.] On such testimony and documentary evidence herein referred to, the Referee filed his Findings of Fact, Conclusions of Law and Order on December 15, 1946 [Tr. 34-45, incl.], holding in favor of the Trustee and ordering Jennie Wuchner, upon payment to her of the sum of \$5,035.43 (which was the unpaid principal and interest at six per cent up to only July 6, 1946 [Tr. 18]), to *concurrently* therewith execute a grant deed to George T. Goggin, Trustee, conveying the property in question to him.

Thereafter appellant, Jennie Wuchner, filed a Petition for a Review of the Referee’s Order [Tr. 46-61, incl.], and on December 16, 1947 Honorable Jacob Weinberger, Judge of United States District Court of Southern District of California, Central Division, entered his order denying Petition for Review and adopted, as modified, the Findings of Fact and Conclusions of Law and Order of the Referee. [Tr. 62-63.]

Specifications of Errors.

Here, in accordance with Rule 20, we have grouped the errors involved and related them to the Findings of Fact and Conclusions of Law and Orders, and appellant's Appeal Points. [Tr. 161-163, incl.]

AS TO WAIVER:

(1) The Referee and Court erred in holding as a Conclusion of Law that "by not legally insisting upon the making of the regular monthly payments * * * the seller waived the provision as to the time being of the the essence contained in said agreement." [Appeal Points I, II, III, Tr. 162; Conclusions of Law I, Tr. 42.]

(2) The Referee and Court erred in holding that Jennie Wuchner, by exercising her option to accelerate payments, waived her right to terminate the agreement by reason of any default in monthly payments. [Appeal Points III and IV, Tr. 162; Conclusions of Law III, Tr. 43.]

(3) The Referee and Court erred in admitting testimony of Dora M. Hill over the objections of appellant as to conversations she had with Norman Wuchner, insofar as it tended to show Norman Wuchner as an ostensible agent of Jennie Wuchner, or attempted to show Norman Wuchner waived any rights of Jennie Wuchner [Tr. 148-159, incl.], Mr. Bearman, counsel for Jennie Wuchner, made the following objections to the testimony of Dora M. Hill in this connection [Tr. 148]:

"Mr. Bearman: I object to the question on the grounds that it is incompetent, irrelevant and imma-

terial and it is calling for a conclusion of this witness; and the further ground that it is clearly shown here that the parties to this contract and to this controversy are Jennie Wuchner and Charles E. Hill, and it would be hearsay insofar as whatever Mr. Wuchner did."

And again [Tr. 149]:

"Mr. Bearman: I object to the question on the ground that no foundation has been laid and any testimony offered here by her (Mrs. Dora M. Hill), would not affect the rights of Mrs. Jennie Wuchner. It is hearsay."

And again [Tr. 151]:

"Mr. Bearman: May I record the same objections to all this line of testimony; incompetent, irrelevant, immaterial and not binding upon Mrs. Wuchner, and no foundation laid, Your Honor * * * that is not the proper way to show agency and is purely hearsay."

Again [Tr. 159]: Mr. Bearman: "Now, Your Honor, at this particular time I move to strike all of the answers and all of the testimony that has been offered by this witness concerning Norman Wuchner on the ground that, insofar as Jennie Wuchner, who is the plaintiff in the action I have referred to and is the same person involved in this particular action, that it is in no way binding on her, and there has been no testimony offered showing an agency or any right on the part of Norman Wuchner to bind Mrs. Jennie Wuchner." [Tr. 159-160.]

(4) The Referee and Court erred in denying appellant's motion at the conclusion of the testimony of Dora M. Hill [Tr. 159] to strike all of her testimony regarding

declarations, statements or admissions of Norman Wuchner on the grounds that such testimony was incompetent to prove ostensible agency and was hearsay and not binding upon appellant, Jennie Wuchner. [Tr. 159-160.]

(5) The Referee and Court erred in considering any question of waiver on the part of appellant. Waiver was not pleaded. [Petition for Order to Show Cause, Tr. 15-16; Testimony of Dora M. Hill, Tr. 139-147, incl.; Appeal Points II, III, Tr. 161, 162.]

AS TO CONDITION PRECEDENT:

(6) The Referee and Court erred in finding as a fact that "no notices of default nor evidence of demand for payment were proven at the time of hearing of this matter prior to demand of February 5, 1946 [Finding of Fact No. II, Tr. 36-37], and in finding as a fact "that pursuant to the terms of the agreement of sale, being Trustee's Exhibit No. 1, the receipt of these moneys was *contingent* upon the seller providing the buyer with a Certificate of Title Policy showing the property free and clear, and in accordance with the terms of the agreement, the said sum of \$4,912.63 was duly offered to Jennie Wuchner, as the seller, at a time when the offer could be performed in accordance with the terms and conditions thereof" [Finding of Fact IV, Tr. 39]; and in finding as a fact that "the said Jennie Wuchner did again arbitrarily and unequivocally refuse to accept any offer of payment and did so refuse without specifying any defect or irregularity in the offer to pay in full as described hereinabove." [Finding of Fact V, Tr. 39; Appeal Points IV and V.] The Referee and Court completely disregarding the provision of the contract [Tr. 98] that timely payments were a condition precedent.

AS TO TENDER:

(7) The Referee and Court erred in holding as a Conclusion of Law “that the buyer made a proper offer * * * with which offer he could then comply, tendering the sum of \$4,912.63 and thereby effectively meeting the demand of the seller as contained in the notice of February 5, 1946; that, contrary to the expressed terms of the agreement of sale and the demand of February 5, the buyer wrongfully failed and refused to accept said offer and the buyer is now entitled to the grant deed to the real property involved and the certificate of title insuring the same pursuant to the terms of said agreement of sale.” [Conclusion of Law IV, Tr. 43; Appeal Points IV and V, Tr. 162.]

(8) The Referee and Court erred in holding that Hill made a legal tender of the sum of \$4,912.63, and in finding as a fact, “the receipt of these monies was *contingent* upon the seller providing the buyer with Certificate of Title Policy.” [Finding of Fact IV, Tr. 39; Appeal Point V, Tr. 163.]

(9) The Referee and Court erred in holding, as a Conclusion of Law, that appellant “did wrongfully notify the buyer that the seller had terminated and cancelled the aforesaid agreement of sale and did repeat this wrongful termination and cancellation by her return of the documents as contained in Trustee’s Exhibit No. 4, being her letter of February 14, 1946, to the attorney for Charles E. Hill, that the aforesaid unequivocal indications by the seller that no offer of performance by or on behalf of the buyer would be considered by her rendered it unnecessary for the buyer to thereafter make any further offer of performance.” [Conclusion of Law V, Tr. 44; Appeal Point VI, Tr. 162.]

(10) That the Referee and Court erred in holding as a Conclusion of law “that, pursuant to the expressed provisions of said agreement, the buyer had thirty days from the date of the receipt of said notice on February 6, 1946 within which to comply with said demand of seller.” [Conclusion of Law II, Tr. 42; Appeal Point IX, Tr. 163.]

AS TO JURISDICTION:

(11) The Referee and Court erred in holding that the Bankruptcy Court had jurisdiction to try this matter in a summary proceedings as all rights of bankrupt Hill in the property under the contract had been terminated and cancelled prior to his adjudication, and any possession of the “*res*” had by him or his Trustee was illegal and that of trespassers only. [Order of Judge Weinberger, Tr. 62; Appeal Point VIII, Tr. 163.]

AS TO ALL ISSUES:

(12) The Referee and Court erred in their interpretation of the real estate contract and the notices given thereunder, particularly the “condition precedent” and “time is of the essence” clauses. [Conclusions of Law and Order of Referee, Tr. 42-45, incl.; Appeal Point IV, Tr. 162.]

(13) The Referee and Court erred in decreeing specific performance in favor of a Trustee of a defaulting bankrupt. A Court of Equity does not aid one in default. [Order of Referee, Tr. 44-45; Order of Judge Weinberger, Tr. 62-63; Appeal Point IX.]

(14) Attorney Fees. The contract provides that in the event an action be instituted under the contract, the Buyer agrees to pay such attorney fees as fixed by the Court. [Tr. 98.] Attorneys’ fees should be allowed by this Court for appellant’s attorneys.

Summary of Argument.

This is an equitable action in bankruptcy brought by a Trustee to enforce specific performance of a contract covering the sale of improved real estate. It presents the rather anomalous situation of a bankrupt vendee coming into a Court of Equity through his Trustee in Bankruptcy and demanding relief based solely on his own default. We believe a careful reading of the real estate contract which we are here concerned with [Tr. 96-99, incl.] will clarify most of the legal questions involved in this appeal. It is a form frequently used in buying and selling real estate. By its expressed terms it makes the performance of the covenants on the part of the vendee a condition precedent to any performance on the part of the vendor. It also expresses that time is of the essence and, in the event or failure to comply with the terms of the contract by the vendee, the vendor shall be released from all obligations of law and equity to convey said premises and the buyer shall forfeit all right thereto and to all money theretofore paid under the contract. It is admitted that the bankrupt vendee made only two monthly payments amounting to approximately \$350.00 on the principal sum due, and that on February 5, 1946 when appellant, Jennie Wuchner, served notice on him demanding payment of the total amount due forthwith, he was in default for five monthly payments, amounting to \$1,000. He was also in default in the payment of taxes. The Trustee, in his petition for an Order to Show Cause under which pleading appellant was taken into the Bankruptcy Court, makes no explanation or excuse for bankrupt's default but rests his action solely on the ground that the bankrupt tendered the entire amount due under the contract, according to appellant's demand of February 5, 1946, to

the appellant on February 11, 1946, and that she wrongfully refused to accept it, and that he, as Trustee, is entitled to specific performance of the contract. This is the only ground for relief set out in the petition [Paragraph II, Trustee's Petition for Order to Show Cause, Tr. 15-16], which allegation was denied by appellant's answer [Tr. 222], and this was the sole and only issue raised by the pleadings, and upon such issue the matter was tried before the Referee. We submit that the burden was upon the Trustee to prove his sole allegation for relief, *i. e.*, that on February 11, 1946, the contract was in full force and effect and binding upon both parties, and that the bankrupt vendee on that day made a legal and timely tender of the money due. The petition of the Trustee did not plead waiver, estoppel, fraud, mistake, surprise or any other ground of equitable cognizance excusing the breach on the part of vendee, nor did the Trustee even offer to prove any equitable excuse for the breach. The Referee, in reaching his Findings and Conclusions, and the Court, in sustaining them, followed a theory not applicable to the facts in this case, as clearly shown by the oral testimony and documentary evidence. To reach their conclusions they had to rely solely on waiver, when it was not pleaded or proved, and on a tender when same was not made. They overlooked entirely the fact that the contract is one based on a condition precedent, and any rights accruing to bankrupt under the contract were conditioned upon the strict performance by him of the covenants of payment of the monthly installment and taxes before he acquired any rights under the contract whatsoever. We think it is elemental that a purchaser who sues the vendor for specific performance must plead and prove performance on his part of all conditions of the contract which are precedent to performance by the vendor.

The Referee and Judge also disregarded "time is of the essence" and "forfeiture" clauses in the contract. The Referee and Judge also disregarded the fundamental equity doctrine that a party seeking a specific performance against another must show, as a condition precedent to his obtaining the remedy, that he has performed all things required of him to be performed. It was stipulated in open court that no payments were made on the contract by the bankrupt vendee subsequent to September 1, 1945. [Tr. 144-45.] To reach their conclusions, Referee and Judge had to disregard the explicit language of the contract that, in the event of failure to comply with the terms by the vendee, seller will be released from all obligations of law and equity to convey said premises, and that the buyer will forfeit all rights thereto. [Tr. 98.] In the instant case, all of the rights of the bankrupt vendee terminated on November 2, 1945 by reason of his failure to make the payment due October 1, 1945. No notice to him by the appellant was necessary to accomplish this result. Under the expressed provisions of the contract, this happened automatically. While all the vendee's rights under the contract terminated automatically on November 2, 1945, it remained in force so as to protect the rights of the innocent vendor and to enforce the obligations of the delinquent vendee. To demonstrate the above, it is only necessary to ask what the decision of a Court of Equity would have been if on November 2, 1945, the present vendee, being in default as he was, asked the aid of a Court of Equity to avoid the consequences of his default and compel the vendor to perform some act under the contract. We submit that it is the universal rule, in the absence of a showing of fraud or other equitable excuses, that the Court would not and could not grant such a vendee any relief. So far as the vendee was concerned, the

contract was at an end. He had no rights under it. The vendor, however, not being in default, did have rights under the contract which she could enforce. If the vendee could not complain immediately after an effective default on his part, he certainly could not do so some months later when his defaults had multiplied. That the parties to the instant contract clearly understood its terms we think is conclusively shown by the clause appended to the original contract by a loose rider. It provides, "It is further agreed that any default shall not become effective for thirty (30) days from date of said default. [Tr. 100.] From this, it can safely be assumed that the vendee knew that, under the terms of the original contract, if he was one day late in making a payment, the contract would automatically be terminated and all that he had paid thereunder would be forfeited. The vendee knowing this, we can further assume, as the clause was for his benefit, that he requested and was granted a thirty day grace period, before a default in the monthly payments became effective.

In our main argument we believe we can demonstrate that, under the law, all rights of the vendee under the contract terminated on November 2, 1945; that all acts of vendor subsequent thereto were simply pursuing a remedy given to her under the contract and necessary to terminate and wind up the transaction and perfect her title. Nothing she did or refrained from doing conferred any rights whatsoever on the vendee.

As to the issue of whether or not there was a tender by the bankrupt vendee to appellant Jennie Wuchner, in response to her demand of February 5, 1946, we believe that the documentary evidence and the oral testimony shows conclusively that there never was a tender or an offer by the vendee and that, at most, it was simply an

invitation to vendor to become a party to a three-cornered real estate deal whereby, if everything worked out, she might, at some uncertain date in the future, obtain a lesser sum of money than that actually due her under the provisions of the contract. The record clearly shows that Mr. Poyet, as President of the Angelus Escrow Service Company, attempted to work out a deal by selling the property to Bruno and Berg, which deal, if appellant were willing to enter into it, might have produced a sum somewhat less than the amount owing her, but the conditions attached to that offer were conditions that she did not have to perform to obtain her money. The Angeles Escrow Service Company did not state in its letter of February 11, 1946, nor did Mr. Poyet, its President, testify when on the stand that it was acting on behalf of the bankrupt vendee, Charles E. Hill. There certainly is more evidence in the record to indicate that it was acting for Bruno and Berg than there is to indicate it was acting for Hill, but, irrespective for whom it was acting, it could not couple its offer with conditions that the vendor did not have to perform. If Angeles Escrow Service Company were acting for Hill and it wanted to meet the demand of the appellant of February 11, 1946, all it had to do was to pay her the money and demand a deed, or it could have, under the provision of Section 1500 of the Civil Code of California, deposited the amount of her demand in her name in any bank of deposit in the State and the debt would have been extinguished. This it did not do and the record clearly demonstrates that this it could not do, as the amount of money in the hands of Angelus Escrow Service Company given it by Bruno and Berg was held by it under an express prohibition against using it until it had secured a grant deed from the

appellant, Jennie Wuchner, and a policy of title insurance, and also her signature on the escrow instructions. Hence, even if it were acting for bankrupt vendee, it had neither the willingness nor the ability to make the payment in accordance with the contract of the parties, and where there is neither willingness nor ability, no tender or offer is made.

The contract gives the vendor, in the event of a default by the vendee, the right to declare the total amount due under the contract, payable immediately. In the instant case, the vendor did demand the entire amount due and so notified the vendee on February 5, which was received on February 6, 1946, and with which demand Angelus Escrow Service Company attempted to comply on February 11, 1946. Appellant's notice demanded the payment "forthwith." There can be no question as to the reasonableness of time in meeting the demand. Their actions on February 11, 1946, clearly demonstrate that the time was reasonable. We believe that merely a reading of the contract is sufficient to demonstrate that the thirty day grace period referred to above did not have any reference whatsoever to the remedies the vendor might pursue in the event of a default. The clause in question simply extended the effective day of a default and referred to the monthly payments. The right of the vendor to declare the entire amount due and payable immediately did not come into effect until after an effective default by the vendee, at which time all rights of the vendee under the contract had been terminated and canceled.

ARGUMENT.

Waiver—Specification of Error I.

(A) This was a summary trial in a Bankruptcy Court between a Trustee and a stranger to the bankruptcy proceeding. The appellant was compelled, by an order of the Referee, to come into his Court and answer to the petition of the Trustee making claim to her property. That the proceedings in a Bankruptcy Court of this nature are governed by the ordinary rules of pleading and procedure, there can be no question. In Vol. 8, *Corpus Juris Secundum*, Sec. 364, the general rule is stated as follows:

“A Trustee in Bankruptcy, in bringing his suit, is subject to the same rules of pleading as if no bankruptcy were pending.”

The petition of the Trustee raised one issue and one issue only. Did bankrupt vendee make a valid tender on February 11, 1946, of the money due under appellant's demand of February 5, 1946. No other issue should have been considered by the trial Referee or by the Judge in passing on appellant's petition for review. Waiver was not pleaded. The Referee, however, based his most important Findings and Conclusions on waiver by appellant. [Tr. 42-43.]

“The party relying upon an equitable estoppel must plead that fact in order that the adverse party may be informed of the nature of the action or defense which he will be obligated to meet.” (*Holzer v. Read*, 216 Cal. 119, 13 P. (2d) 697; *Fair Oakes Bond v. Johnston*, 198 Cal. 196, 244 Pac. 335.)

“Issues are made by the pleadings, not by the evidence introduced.” (*Shaw v. McCaslin*, 50 Cal. (2d) 467, 123 P. (2d) 915.)

“A party must recover, if at all, according to his pleadings rather than on some other or different cause which may have been developed by the proof.” (*Van Goverlitz v. Turner*, 65 Cal. (2d) 425, 150 P. (2d) 278.)

“The doctrine of waiver involves the voluntary relinquishment of known rights.” (*Cook et al. v. Commercial Casualty Co.*, 160 F. (2d) 490.)

“It is elementary that an intention to forego or abandon a right is an essential element of waiver.” (*Estate of Howe*, 80 A. C. A. No. 7—970.)

In the case of *Nakdimen v. Baker*, 111 F. (2d) 778, at page 782, the Circuit Court for the Eighth Circuit said regarding waiver:

“The short answer to this contention is that Nakdimen did not plead waiver as an affirmative defense and the issue was not raised, considered, nor passed upon in the District Court.” (Rules 8 (C), 12 (B), 12 (H), and 15 (B), Rules of Civil Procedure.)

In his Conclusion of Law No. I [Tr. 42], the Referee held “by not legally insisting upon the making of the regular monthly payments * * * the seller waived the provision as to time being the essence.” It is difficult, if not impossible, to determine what the Referee means when he uses the term, “*not legally insisting upon.*” Does he mean, that, as a matter of law, a vendor or creditor in a written agreement must take some affirmative action each time a payment becomes due or his rights under the

clause making time essential is absolutely lost? If so, what act constitutes *legal insistence*? Does it mean a Court action, or some act less than a Court action? As stated above, this “waiver” which the Referee found as a matter of law was not pleaded and therefore should not have been considered. The Referee made no Finding of Fact supporting this legal conclusion nor is there any evidence in the record, either oral or documentary, which in any way refers to this. In his Findings of Fact II [Tr. 37] the Referee did find as a fact that “no notices of default nor any evidence of demand for payment were proven at the time of the hearing of this matter prior to the demand set forth * * *.” The simple answer to this is that, under the contract, no notice of default in monthly payments was required. Whether any notice of default was or was not given was, by no possible stretch of the imagination, within the issues. The Trustee did not prove or offer to prove that any notices were given or not given, and it certainly was not incumbent upon the appellant to do so. The record is absolutely silent on this matter. The Referee injected this issue into his Findings and Conclusions entirely on his own motion. It was neither pleaded by the Trustee nor was any proof even offered by him to establish the fact, one way or another. This negative finding of fact concerning something entirely foreign to any issue in the case attempts to write into the contract of the parties something they did not agree to. The legal conclusion based on such finding is therefore illegal and void.

Specification of Error II.

(B) The Referee's Conclusion of Law No. III [Tr. 43] again relies on waiver to sustain his position. The particular act that is claimed constituted the waiver here is that appellant, by declaring the entire sum due, waived any right she had to terminate the agreement by reason of any default arising from nonpayment of the monthly installments. Her right to demand immediate payment of the entire amount due under the contract came into existence *only* upon the occurrence of an effective default in the monthly payments. How could the exercise of a right waive the consequences of a default which created the right? The contract had already been terminated by the default. The demand for the immediate payment of the entire amount due under the contract was a remedy expressly given her by the contract itself if default occurred. It was for the purpose of winding up and terminating the transaction one way or another.

Again this waiver was not pleaded nor were any of the acts claimed to constitute the waiver pleaded, or even proved. The general rule followed in California is stated in 25 *Cal. Jur.* 931, Section 6:

“Sec. 6. Pleading.—The general rule is that a plaintiff who relies upon the waiver of the performance of an act upon which his right of action depends must specifically plead it. If he pleads performance he must prove it rather than some excuse for non-performance; but where he makes out a *prima facie* case he may take advantage of a waiver of performance proved by the defendant even though it is not pleaded. If a plaintiff relies on waiver as

to any defense which would otherwise be available to the defendant under the fact stated in the complaint, the facts constituting such waiver must be pleaded in the first instance.”

And again, the same volume, Section 7, states the following:

“Sec. 7. Evidence.—The burden is upon the party claiming a waiver to prove it by such evidence as does not leave the matter doubtful or uncertain.”

The Court said, in *Mitchell v. Cheney Slough Irr. Co.*, 57 Cal. App. (2d) 138, 134 P. (2d) 34:

“Moreover, the defendant failed to plead an estoppel. The cause was evidently not tried on the theory that an estoppel was relied upon by the defendant.
* * * The rule is firmly established in California and in most other jurisdictions that waiver or estoppel must be pleaded to render it available as a defense.”

And in *Krobitzsch v. Middletown*, 72 Cal. (2d) 804, 165 P. (2d) 729, the Court said:

“One claiming a waiver must prove it by such evidence as does not leave the matter doubtful or uncertain.”

“The waiver of a contractual right must have been a clear, unequivocal and decisive act of the party showing such a purpose or act to amount to an estoppel on his part.” *In re Zimmerman* 35, Federal Supplement 13.

“Where a waiver relied on is not an express one but must be inferred, it is essentially a matter of intention and must be indicated in some unequivocal manner, and the person who alleges its existence

has the burden of proving the waiver by evidence which does not leave the matter doubtful.” (*Coca Cola v. Commissioner*, 127 F. (2d) 430.)

“Waiver must be pleaded with particularity and certainty, without leaving anything to be supplied by inference or intendment, and where there are grounds for inference or intendment, it will be against and not in favor of the estoppel. (*Cohan v. American Surety Company of New York*, 120 F. (2d) 393. Certiorari denied, 314 U. S. 667.)

“Estoppel must be assertively pleaded.” (*Boles v. Capitol Packing Company*, 143 F. (2d) 87.)

We submit that, as the waiver referred to under this specification was not pleaded nor proved, the Findings of Fact and Conclusions of Law based thereon are illegal and void.

Specifications of Error III, IV and V.

(C) The Referee, over the objections of appellant, allowed the witness, Dora M. Hill, to testify as to conversations she had with Norman Wuchner, son of appellant. [Tr. 147-155.] She testified at the trial that she never had any conversation with Jennie Wuchner, the appellant, and that she was not with her husband, Charles E. Hill, bankrupt, when the original sale was negotiated. She testified she was present when the bankrupt and Norman Wuchner discussed the sale, and that the payments made under the contract were made by check payable to Norman Wuchner, and that he came down to the plant to collect them. She testified that the last conversation she had with Norman Wuchner about payments was in the middle of October, 1945, which conversation was as follows: “Well, as much as I can

recall now, I mentioned that I might be late with the payments then, because I was kind of upset by everything else that had happened; and he told me not to worry about it * * *. He said, 'Don't worry; we can work something out. I'm not interested in having all the money at one time. I want the interest on it over a time for my mother's income.'” [Tr. 153.] The appellant made strenuous objection to all of this testimony (see verbatim objections under Specification of Error III), and at its conclusion moved to strike all of Dora M. Hill's testimony relating to Norman Wuchner on the ground that it was not binding on Jennie Wuchner and was incompetent, immaterial and hearsay. [Tr. 159-160.]

It is to be kept in mind that Dora M. Hill was not a party to the contract. There is no evidence in the record that she even had authority to represent the bankrupt Charles E. Hill at the time these conversations were supposed to take place. (The record shows that her power of attorney to represent Hill was dated November 6, 1945 [Tr. 139], which was subsequent to the conversations with Norman Wuchner.) There is no evidence of any kind in the record that Norman Wuchner had any authority to represent Jennie Wuchner. Dora M. Hill admitted that she had never talked with Jennie Wuchner herself nor had she even been present when Charles E. Hill had any conversations with her. She did not testify that Norman Wuchner represented himself to her or to anyone else as the agent of Jennie Wuchner. She did not testify that she communicated anything Norman Wuchner told her to the bankrupt Charles E. Hill. She did not testify that she or bankrupt relied upon the alleged statements of Norman Wuchner or that they were misled thereby.

We have a situation here of two complete strangers to the contract having conversations or alleged conversations which were not communicated to the principals, being admitted in evidence for the purpose of establishing an agency under which agency the agent waived valuable rights of Jennie Wuchner. We submit that this evidence is and was incompetent on its face and should not have been considered. If any agency in fact existed, the trustee could have very easily established the fact by calling to the stand Jennie Wuchner, Norman Wuchner or Charles E. Hill. He chose instead to try to establish it by the hearsay testimony of the wife of the bankrupt.

The rules of evidence relating to the establishment of agency are well known to this Court and we will refer only to a few authorities on the question.

The general rule is stated in 1 *Cal. Jur.*, p. 698, Sec. 8, as follows:

“It is a rule of long standing in California that the declarations of an agent not made under oath or in the presence of the principal, and not communicated to or acquiesced in by him, are not admissible to prove the fact of his agency. One who deals with another upon his mere statement that he is the agent of a third person takes upon himself the risk of being able to show that such agency existed. If, instead of satisfying himself by an independent investigation, he accepts such statement and is deceived, he is the victim of his own credulity. * * * (And cases cited thereunder.) The rules just stated are applicable not only as

proof of the fact of the agency but also of the extent of the agent's authority."

"Evidence of the declarations of a third person that one signing a contract was the agent of the defendant is hearsay and hence inadmissible." (*Scott v. Los Angeles Mountain Park Co.*, 92 Cal. App. 258, 267 Pac. 914.)

"The admissions, statements and declarations of an agent other than his own testimony in the case in which the issue arises are not admissible to prove such agency." (*Syar v. U. S. Fidelity & Guarantee Co.*, 51 Cal. App. (2d) 52, 125 P. (2d) 102.)

"The declaration of a person that he is the agent of another is not competent evidence of agency unless it was made in the presence of, or was communicated to and acquiesced in by the principal." (*Dooly v. West American Commercial Insurance Co.*, 133 Cal. App. 58, 23 P. (2d) 766.)

"Notwithstanding broad statements in a few cases that the declarations of an agent are admissible against the principal to show the extent of the authority of the agent, it is elementary that the acts or representations of an agent are not admissible against the principal to prove the power or authority of the agent or the scope or extent thereof, unless such acts or declarations were done or made in the presence of the principal or were within his knowledge or were authorized or ratified by him, or there is other evidence of authority. This rule refers to declarations made by the agent out of Court, off the

witness stand, or otherwise than in his sworn testimony, and it means that such declarations cannot be testified to by a third person for the purpose of proving the scope or extent of the authority of the agent.” (3 *Corpus Juris Secundum*, 285, Sec. 324-C.)

And again, in the same volume, at p. 276, Sec. 322 C (1), it is stated:

“In the absence of other evidence of agency, the extra-judicial declarations of an alleged agent to a third person are not admissible against the alleged principal to prove agency.”

The testimony itself of Dora M. Hill did not, in fact, prove agency. She testified she was worried and upset, not because her husband could not keep up their payments but because he was held in jail, charged with the commission of an infamous crime. Norman Wuchner simply told her not to worry and that he was not interested in having all the money at one time but wanted the interest for his mother's income. At best, it was merely the voluntary sympathy of a stranger to the contract. Hill was in no sense misled by it.

From the foregoing, we believe it is clear that not only was waiver not pleaded but it was not proved and that there is not one scintilla of competent evidence in this record, either oral or documentary, that can support or uphold the Findings and Conclusions of the Referee based on waiver by appellant.

Specifications of Error VI, VII, VIII, IX and X.

(D) The appellant, Jennie Wuchner, after the contract had been canceled, and for the purpose of terminating and winding up the transaction one way or another, served on bankrupt Hill a notice dated February 5, 1946, demanding payment of all sums then due under the contract forthwith. This remedy was expressly given to her by the contract in the event of vendee's default and is a procedure usually followed by a vendor when the vendee defaults on a contract. The notice called for the payment forthwith of all sums due under the contract which, as of February 5, 1946, amounted to \$4,912.63. The appellant never heard anything from the vendee, Charles E. Hill, in response to this demand, although it appears in the record he received the notice on February 6, 1946. Nor did she receive any word from Dora M. Hill, the wife of the bankrupt vendee, who at that time was purporting to act for him under a power of attorney, although she also received a copy of the demand on February 6, 1946. On February 12 or 13, 1946, the appellant, Jennie Wuchner, did receive a letter from the Angelus Escrow Service Company signed by one Henry F. Poyet, its President. [Tr. 115-116.] The letter enclosed certain escrow instructions which the appellant, Jennie Wuchner, had to sign. The instructions constituted a new contract between herself and the defaulting vendee, Charles E. Hill and the Angelus Escrow Service Corporation. The instructions themselves, and the statement of identity, take up nine pages of the printed record [Tr. 116-125, incl.] and contain many conditions which the appellant had to agree to. Poyet, neither in the letter to the appellant nor in his testimony when he was on the stand, stated that the Angelus Escrow Service

Company was acting on behalf of Charles E. Hill, bankrupt, or that it was making the offer on behalf of the said Hill, with his assent. The letter simply stated that, in accordance with appellant's demand of February 5, 1946, directed to Charles E. Hill, there was on deposit at that time with the Angelus Escrow Service Company the full amount of her demand "subject to the escrow instructions for clear title as therein set forth." At the trial it was developed by the testimony of Poyet that, as a matter of fact, there wasn't any money in the particular escrow referred to in his letter to appellant of February 11, 1946 [Tr. 129] and that, as a matter of fact, there was no money in the hands of the Angelus Escrow Service Company to which bankrupt Hill was entitled, had any claim to, or any direction over. It developed, by Poyet's testimony, that the only money in any way referring to this transaction which was on deposit with the Angelus Escrow Service Corporation was some money belonging to Frank Bruno and Teddy Berg, as set out in Trustee's Exhibit No. 5 [Tr. 136-137], wherein the said Bruno and Berg delivered to the Angelus Escrow Service Company the sum of \$4,912.63 under the following conditions: "which you *are to use when you* can comply with the foregoing instructions of Charles E. Hill, purchasing the property therein described free of liens and encumbrances as therein set forth, and, in addition thereto, you will record for us concurrently with the deed from Mrs. Jennie Wuchner to Charles E. Hill a deed from Charles E. Hill and Dora Hill, his wife, to Frank Bruno and Teddy Berg to the above described property. You will have the title showing free and clear of encumbrances said property to Frank Bruno and Teddy Berg." While the record is silent as to who the Angelus Escrow Company represented, we believe it is quite clear from the

above letter that it represented Bruno and Berg. Poyet failed to state that Angelus Escrow Service Company was acting for the defaulting vendee, and Mrs. Hill did not testify that the Angelus Escrow Service Company was acting on behalf of Charles E. Hill or of herself. It is therefore safe to assume from the record that Angelus Escrow Service Company was acting for and on behalf of Bruno and Berg.

From a reading of Angelus Escrow Service Company letter [Tr. 115-116] to the appellant, and Bruno and Berg's letter to it [Tr. 136], both under date of February 11, 1946, it is clear that the appellant could not receive the amount of her demand of \$4,912.63, which included interest only up to February 5, 1946, until she performed various conditions which were imposed upon her by the above referred to letters, escrow instructions and statement of identity which were made a part of the transaction. First, she had to enter into a new written agreement with Charles E. Hill and the Angelus Escrow Service Company which constituted the escrow instructions and an agreement with Frank Bruno and Teddy Berg, as they made the escrow instructions a part of their letter when they conditionally deposited the money with the Angelus Escrow Service Company. Second, she had to agree in the escrow instructions that the escrow would remain open until May 6, 1946, or more than three months after the date of her demand, and that at that time, unless the escrow was further extended, she would only receive the sum of \$4,912.63, which included interest only to February 5, 1946. Third, she had to also sign a statement of identity giving her residence or residences for the past five years and also a statement as to any former marriages. Fourth, she also had to deposit a deed and a policy of title insurance. Under the setup

that she was required to enter into, she had to do all these things before she could obtain any money. She was not advised who made the deal with Bruno and Berg, who were conditionally putting up the money, and she could not know what representations might have been made to Bruno and Berg to induce them to enter into the contract. For all she knew, they might rescind their agreement prior to May 6 at the close of the escrow and demand the return of the money they had deposited. In this connection, if she signed the escrow instructions she might become liable for costs and attorney fees of the Angelus Escrow Service Company, if any litigation developed between the Hills and Bruno and Berg. This was a clear attempt on the part of either Angelus Escrow Service Company or Bruno and Berg, who were all perfect strangers to the contract between the appellant and the vendee, Hill, to impose conditions upon her that were not provided for in the contract. The bankrupt Hill had defaulted the contract. His obligation, as of February 5, 1946, was plain and unambiguous. To obtain legal title to the property in question and a policy insuring such title, all he had to do was to pay to the appellant the amount of her demand, and neither he nor the Referee nor anyone else could write a new contract for her and impose obligations and conditions upon her which she had never in any manner agreed to. It has been well said that the best way to handle a debt is to pay it. He, Hill, or someone with his assent, acting for him and in his behalf, could have offered Jennie Wuchner the money or a check for the money, or he or someone acting for him could have simply deposited the money to her credit in any bank in the State and, in accordance with Section 1500 C.C., the debt would have been extinguished, he would have obtained title and the matter would have

been closed. This he either refused to do or could not do—the result is the same. The Referee, in his Findings and Conclusions of Law, referred to in the above Specifications of Error, undertook to write into the contract of the parties a long list of conditions and obligations, which were to be performed by appellant, and which were not in the contract and to which she never agreed. Evidently the Referee and the Court, in upholding Referee's Findings and Conclusions, interpreted this contract as though it were based on a condition subsequent. The Referee's Finding of Fact No. II [Tr. 36-37], wherein he held that the "receipt of the money by the appellant was *contingent upon her providing* the buyer with a Certificate of Title Policy," is clearly in error. All of the conditions in the contract are conditions precedent to be performed by the buyer before he had any rights under the contract. At most, when the final sum was due, the obligation of the appellant to furnish deed and policy of title insurance was concurrent or mutual. There was no obligation upon her to first do anything to obtain her money.

It might be well to first refer to the pertinent sections of the Civil Code referring to tender or offer of performance.

Section 1487, Civil Code, is as follows:

"By whom to be made. An offer of performance must be made by the debtor or by some person on his behalf and with his assent."

It is clear from the record in this case that the debtor did not make an offer and there is no showing that any other person made an offer on his behalf or with his assent.

Section 1490, Civil Code, provides:

"When offer must be made. Where an obligation fixes a time for its performance, an offer of performance must be made at that time within reasonable hours and not before nor afterward."

Section 1493, Civil Code is as follows:

"Offer to be made in good faith. An offer of performance must be made in good faith and in such manner as is most likely under the circumstances to benefit the creditor."

Section 1494, Civil Code, provides:

"Conditional offer. An offer of performance must be free from any conditions which the creditor is not bound on his part to perform."

And Section 1495, Civil Code, provides:

"Ability and willingness essential. An offer of performance is of no effect if the person making it is not able and willing to perform according to the offer."

Section 1500, Civil Code, provides:

"Extinction of pecuniary obligation. An obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor, with some bank of deposit within this State, of good repute, and notice thereof is given to the creditor."

Section 1501, Civil Code, provides:

"Objections to mode of offer. All objections to the mode of an offer of performance which the creditor has the opportunity to state at the time to the person making the offer, and which could be then obviated by him, are waived by the creditor if not then stated."

The leading case in the State of California passing on most of the questions involved in this appeal is *Glock v. Howard & Wilson*, 123 Cal. 1-21, incl., 55 Pac. 713, 43 L. R. A. 190. This case was decided in 1898 but it has been followed and approved by a great many subsequent cases of California Appellate and Supreme Courts and also by the U. S. Circuit Court of Appeals for the Ninth Circuit. The case involved a contract for the sale of real estate, the consideration to be paid in installments with a provision that time was essential, and performance by the vendee was a condition precedent, on the performance of which depended the agreement of vendor to convey, and with a provision if plaintiff failed to perform vendor was released from all obligations to convey and all sums paid thereunder were forfeited. After effective defaults on the part of the vendee, he attempted to tender to the vendor all sums due and offered to comply with all terms and conditions of his contract and demanded a deed. The Court, on page 4 of the opinion (123 Cal.) states the issue raised as follows:

“The case stands then upon this proposition: That under a contract for the sale of realty, where time is of the essence, a vendee, after breach of covenant to pay, performance of which is made a condition precedent to his right to a conveyance, may, without excusing his default, by a tender of the amount due, acquire some legal or equitable right which warrants his recovery of the moneys he has paid.”

And again, on page 9 of the opinion, the Court said:

“One other point invites brief attention before application is made of these well settled principles to the contract and facts in the case at bar. In this, as is usual in such contracts, time is expressly de-

clared to be essential. It was always considered essential at law but it has sometimes been said that equity will not or does not so regard it. This, however, means no more than that, if equitable grounds in excuse of a default are shown, equity to avoid forfeiture will relieve the vendee and uphold a tender made after time. * * * In no other sense is the expression true. Where time is expressly made of the essence of the contract, equity will not ignore the provision, for equity follows the law and will neither make a new contract for the parties nor violate that which they have freely and advisedly entered into."

And again, in the last paragraph of page 10 of the opinion, the Court said:

"One thing more he may do, but this is rather incidental to the fact that he has made the contract than a right growing out of it. It has heretofore been said that in certain cases equity will relieve the vendee from the effect of a breach of his covenant to pay upon a day certain. When such relief is granted, it is only after a showing of fraud, mistake, surprise, or other ground of purely equitable cognizance excusing the breach. Now, as the vendee in default may maintain such an action, so may the vendor call the defaulting vendee into a court of equity and compel him to show why all his rights under the contract should not be held to be at an end. The vendor, when he prosecutes such an action, does so to cut off the possibility of any future claim by the vendee to equitable relief which might embarrass or cloud his title. In some forums, this is designated an action for rescission. With us, it is commonly called an action to foreclose the vendee's rights."

Such an action, and so designated, was filed by the appellant herein in the State Court, which is still unanswered and pending [Tr. 16], before she was summarily compelled to appear in the bankruptcy court.

Continuing in the *Glock v. Howard & Wilson* opinion, the Court, in the last paragraph on page 14, made a pertinent observation as follows:

“It would be to the last degree unjust and inequitable to allow a vendee, after his default under such a contract, to put the vendor in default by a mere tender. The practical effect of such a rule would be that a vendee, without risk, could speculate indefinitely in the land of the unfortunate vendor. The vendee would enter into a contract in which time would be declared of the essence and stipulate under condition precedent, as in this case, to make payment at a certain time. Failing to make payment, he would three months, six months, one year, or, as in this case, over three years after the date of the failure, make an offer to perform and, if the land had risen in value, according to the theory of respondents here, could compel performance.”

And Judge Henshaw, in concluding his opinion, on page 16 of the opinion states:

“In the case at bar, the payment of the final amount under the contract, at the time and in the manner agreed upon, was a condition precedent to the right of the vendee to demand a conveyance. Upon his failure to make payment, the vendee committed a breach, and no affirmative act upon the part of the vendor was necessary to bring about this result. Months after, and without any equitable showing to relieve the default, the vendee makes tender and, because of its refusal, claims the right of recovery.

But the vendor, in refusing to accept the tender and to repay the money, is neither violating his contract nor rescinding it or treating it as at an end. He is standing squarely upon its terms. The vendee is within the rule declared by Pomeroy and above quoted. The contract is made to depend upon a condition precedent. By its terms, no right is to vest in the vendee until certain acts of payment have been done by him, and a court of equity, no more than a court of law, will relieve a vendee under such circumstances from the penalties arising from the breach of such condition in the absence of an equitable showing to excuse his default. None is here even attempted to be made."

Another leading California case is *Troughton v. Eakle*, 58 Cal. App. 161, 208 Pac. 169, (rehearing denied by Supreme Court.) This case discusses in considerable detail the question as to the validity of a tender when coupled with a condition which the vendor did not have to perform. In the *Troughton* case, as in this one, a contract for the sale of real estate was involved. It called for annual payments of \$3,000 per year until \$7,500.00 had been paid, whereupon vendor agreed to deliver a deed and take back a mortgage for \$24,500.00 as the full purchase price. The final payment was due on October 1, 1920 and the vendee attempted to make a payment of the sum due, but, as a condition to his offer, required the vendor to first deliver a deed. The vendor refused. The action was for the amount of money that the vendee had previously paid to the vendor. The lower court granted a judgment to the vendee for \$6,300.00. In reversing the lower court's decision, the Appellate Court, through Judge Burnett, expressly approved the *Glock v. Howard* case hereinabove quoted from and, regarding the purported

offer of the vendee, stated as follows on page 165 of the opinion:

“The parties were very careful to provide that the performance, by plaintiffs of their covenants, was to be a condition precedent to the obligation of defendant to convey the title. When plaintiffs paid the money or made a valid offer to do so, they could demand a conveyance and not before. The covenants are not concurrent or reciprocal, as sometimes termed, and hence it necessarily follows that plaintiff’s payment of the money or offer to pay could not be coupled with the condition that the conveyance be made before the money was transferred. Plaintiffs’ obligation was absolute and unconditional to pay before they could call upon defendant to act at all, but if they paid according to their agreement, or offered to pay, and defendant refused to accept the money, or if by the conduct of defendant plaintiffs were prevented from making such payment or offer by depositing the money as provided by Section 1500, C. C., they would be in a position to compel conveyance or to recover the money already paid. This seems plain on principle and is in consonance with the authority cited by the appellant.”

And again, on page 167, the Court continued:

“Unless we are to depart radically from the terms which the parties herein deliberately adopted to express their intention, we must hold that plaintiffs were required to perform their agreement or offer to do so before they could place the defendant in default. But if their performance was made precedent and unconditional, it necessarily follows that if they relied upon an offer or performance or tender it must also be absolute and unconditional in order to impose upon defendant an obligation to convey. An offer

to perform could, of course, be no more nor less than a legal effort to do what the contract required. That is, to pay the money unconditionally. But respondents admit that the plaintiffs did not have the money themselves to make the final payment falling due October 1st and, in order to prevent their forfeiture, made arrangements with a Miss Forgeus, by which she agreed to advance the money to them for this purpose upon the condition that respondents would convey the land to her, Miss Forgeus, *making it a condition* that the money should not be paid over to Mrs. Eakle except upon condition that Mrs. Eakle executed her deed.”

The Court reviewed the evidence offered at the trial in considerable detail. It developed that the Troughtons got a Miss Forgeus to deposit the \$5,000 due October 1 in the Bank of Williams and instructed the cashier to pay it over to Mrs. Eakle, vendor, when they had a deed from Mrs. Eakle to Miss Forgeus. The Court, on page 170 of the opinion, continued:

“Defendant manifestly was under no obligation to give heed to that proposal. Her duty was to convey to plaintiffs, upon their payment or unconditional offer of payment of said sum. Moreover, under Section 1495 of the Civil Code, an offer of performance is of no effect if the person making it is not able and willing to perform according to the offer. It clearly appears from the testimony of the witness (the bank cashier) that he could not and would not pay over the money until he got the deed for Miss Forgeus. Hence, he had neither the ability nor willingness to make the payment in accordance with the contract of the parties herein. * * * Under the circumstances, whatever offer or promise was made by Mr. Stovall (bank cashier) did not put appellant in default. At

least it involved a condition which he had no right to impose. But if it could be said that an offer to pay the money if appellant would execute a deed might be regarded as satisfying the requirements of the contract, and if Mr. Stovall disregarded his instructions and made such an offer, the promise was futile because of his inability to perform."

And the Court further said, on page 172 of the opinion:

"It may be, as suggested by respondents, that, if she had accepted the conditional offer, she would have received the money and the note and mortgage would have been executed, but she had the legal right to stand upon her contract and to insist that respondents comply with its terms."

In the *Troughton* case, the vendees made a second offer, or tender, on October 2, the first offer having been made on October 1, the date the final sum was due. Regarding this, the Court said, at the bottom of page 172:

"But, as we have seen, time was made of the essence of the contract and the payment was to be made not later than October 1. If any forfeiture occurred, it was complete on that date and it could not be undone by any act of respondents on a later date. Besides, it appears from the record that the offer was made on October 2 on the expressed condition that she would execute a deed to Troughton, and the latter to Miss Forgeus, before appellant should receive the money. Indeed, it is admitted by respondents that plaintiffs were able only to pay this money to defendant upon condition that she execute her deed. Such was not the engagement of the parties and there is no question of their right to make the unconditional payment an essential pre-requisite to entitle plaintiff to demand a deed."

Both the *Glock v. Howard & Wilson* case and the *Troughton* case cite many authorities for the principles enunciated in the two opinions. These principles have been followed by the California Courts down to the present time.

It is interesting to note that the facts in the *Troughton v. Eakle* case are very similar to the facts in the present case. In the *Troughton* case, a stranger to the proceedings deposited the amount due the vendor in a bank but under a condition that the vendor first execute a deed before the money was to be available to her. In the case under consideration, Bruno and Berg, who were strangers to the contract and not acting for bankrupt, deposited the money due the vendor with the Angelus Escrow Service Company, upon condition that the money could not be used until the Angelus Escrow Service Company secured the signature of appellant vendor to escrow instructions containing many conditions, among which was one that appellant vendor could not receive the money for over three months, also her signature to a statement of identity. Besides this, she had to deposit a grant deed and a title insurance policy in the escrow.

We reiterate again that the only issue involved in this action that is raised by the pleadings and was therefore properly before the Court is the question of whether or not the bankrupt vendee made a legal tender of the money due appellant on February 11, 1946, in response to her demand of February 5, 1946.

Section 1487 of the Civil Code states that an offer of performance must be made by the debtor or by someone on his behalf and with his assent. In this case, the bankrupt Hill never offered to perform. Hill never communi-

cated with appellant in any way. The only information she received concerning the attempted offer was the letter from Angelus Escrow Service Company of February 11, 1946. [Tr. 115-116.] There is nothing in the record to show that Angelus Escrow Service Company made the offer on behalf of Hill or with his assent. In fact, we think the record is clear that it was acting for Bruno and Berg, the persons who were conditionally furnishing the money. There certainly is nothing in the record to show that it was acting for Hill or made what offer they did make on his behalf or with his assent. Poyet stated that he was representing the bankrupt Hill as his attorney, but it is not claimed, and the record does not show that he made any offer of performance to the appellant on behalf of the bankrupt or with his assent. Dora M. Hill, wife of the bankrupt and his attorney in fact, did not make any offer of performance on Hill's behalf or with his assent. We think the record shows conclusively that no one made any offer of performance of appellant's demand of February 5, 1946 on behalf of the bankrupt or with his assent. When appellant received the letter from Angelus Escrow Company on February 12, 1946, containing the escrow instructions and conditions, it was impossible for her to know that even an attempted offer was being made on behalf of the bankrupt Hill. It is safe to presume that she knew that Hill was in the penitentiary; that the property had been abandoned and that Hill could not meet his obligations. When she discovered that the only money in sight was the money put up conditionally by Bruno and Berg, she had a right to believe that no offer of performance was being made by Hill or anyone on his behalf and that strangers to the contract were attempting to speculate with her property.

Under Section 1493 of the Civil Code, the offer of performance must be made in good faith and in such a manner as is most likely under the circumstances to benefit the creditor. We submit that in this case the record conclusively shows that the pretended offer was not made in good faith and was not made for the purpose of benefiting the appellant.

Under the escrow instructions, appellant had to wait until after May 6, 1946 before she could even demand the money that was due her from Hill on February 5, 1946. In deciding whether she should disregard the letter from the Angelus Escrow Service Company of February 11, 1946, she had to consider what her position would be if she signed the escrow instructions and entered into a new three-cornered agreement. First the deal was to be tied up for over three months. In the event the market for real estate declined in that interval, she had to consider the possibility of Bruno and Berg rescinding their agreement to purchase the property and obtaining the return of the money they had conditionally deposited with Angelus Escrow Service Company. In that event—and it was a very probable one—she would be left holding the proverbial “bag.” She could not sue Bruno and Berg as she had no dealings with them. Nor did she have any knowledge of what representations were made to Bruno and Berg to induce them to purchase the property. She knew the Hills were insolvent and badly involved with other creditors. Not only the fact that the letter of Angelus Escrow Service Company of February 11, 1946 was not a legal offer of performance, but simple business prudence would compel her to disregard said letter.

We believe Sections 1494 and 1495 of the Civil Code, which provide that an offer of performance must be free

from any condition which the creditor is not bound to perform, and that an offer is of no effect if the person making it is not able to perform, need no further elaboration. Any offer made to appellant in this case was conditioned and the party making it did not have the ability to perform.

The vendee did not have any rights under the contract on February 5, 1946, the date appellant made demand upon him. His rights had all been cancelled automatically by his own default. Nothing he could do subsequent to this could restore to him any rights under the contract, nor could any act on his part put the appellant in default. Appellant did not have to give him any notice under the contract whatsoever. She could have remained inactive and stood upon the forfeiture. However, she chose to pursue a remedy given her and demand the entire amount forthwith. This was for the purpose of winding up the transaction and perfecting her title and, to avoid any subsequent action on the part of the vendee under Section 3275 of the Civil Code. She gave appellant the opportunity of paying the entire amount due and getting a deed for the property. For his failure or inability to take advantage of this offer, the appellant can in no way be held responsible.

The obligation of the bankrupt was to pay "forthwith" or "immediately." The exact lapse of time these terms denote we do not believe material here. The demand was received by the bankrupt on February 6, 1946. He attempted to respond to it on February 11, 1946 and demonstrated his utter inability to perform. The question of reasonableness of time is therefore not involved.

The Referee's holding, as a Conclusion of Law [Tr. 42], that buyer had thirty days after February 6, 1946,

in which to comply with the demand is clearly in error. It is not supported by any fact in the record and is contrary to the express terms of the contract itself. The vendee did not have any rights under the contract of any kind on February 5, 1946. All rights had been terminated by his own default on November 2, 1946 and on successive defaults thereafter. The thirty day provision had no relation to remedies the appellant could pursue after there had been an effective default on the part of vendee.

While it was not incumbent upon the appellant to give the bankrupt any notice of the cancellation of the contract, she had a perfect right to do so and she did give him such notice, both on February 8, 1946 [Tr. 101], and on February 14, 1946 [Tr. 115], so that there could be no misunderstanding on the part of the bankrupt as to his position in the matter. He knew from these notices that appellant was standing squarely on the contract and that his rights thereunder had been cancelled and forfeited; that to wind up the transaction under her demand of February 5, 1946, he could pay her all money due and obtain the legal and equitable title to the property.

From the above, it follows that Findings of Fact and Conclusions of Law of the Referee, and his Order issued pursuant thereto, and the Order of the District Judge upholding said Findings and Conclusions are not supported by any evidence in the record and are against the evidence, and the Order of the District Judge in sustaining said Findings and Conclusions is error and should be reversed.

JURISDICTION.

Specification of Error XI.

(E) The appellant at all times in this proceeding made timely and continuing objection to the jurisdiction of the Bankruptcy Court to try this matter. The appellant, Jennie Wuchner, filed an action in the Superior Court of Los Angeles County on February 20, 1946, against the bankrupt Hill to quiet title and foreclosure of purchaser's rights. Thereafter, on April 1, 1946, an involuntary petition in bankruptcy was filed against Hill and on May 1, 1946, said Charles E. Hill was adjudicated a bankrupt. At the time the involuntary petition was filed and on the date he was adjudicated a bankrupt, he had no interest to, or any rights in, the real estate involved in this action. As shown by the foregoing argument, all of his rights had been terminated and cancelled by reason of his defaults under the contract between the parties and also his default in meeting appellant's demand of February 5, 1946. This was not a question involving a matter of bankruptcy but the most it involved was a question arising out of a bankruptcy. We believe it to be the rule that a Bankruptcy Court will not interfere with the jurisdiction of a State Court when neither the legal nor equitable title to the real estate involved nor the possession thereof was in the bankrupt at the time of the filing of the petition in bankruptcy. The action pending in the State Court brought by appellant, is the ordinary action required by title companies to foreclose of record the rights of a defaulting vendee. The action was pending when the trustee was appointed. He had a perfect right, if he wanted to, to appear and defend said action on behalf of the bankrupt's estate. For some reason undisclosed, Trustee did not choose to do this but insisted upon bring-

ing the appellant into the Bankruptcy Court for the purpose of trying out the title to her property in a summary proceedings. The bankrupt had no interest in this property, either legal or equitable, as of the date the bankrupt's petition was filed, and he did not have legal possession of said property, either actual or constructive. The property had been abandoned. The trustee can have no better right than the bankrupt and the claimed possession of the property by the trustee was not a legal possession but at most that of a trespasser.

We do not believe that the Referee had any jurisdiction to try this matter and the petition of the trustee should have been dismissed. It has sometimes been loosely said that the vendee under a contract for the sale of real estate holds the equitable title. This statement must be qualified and limited to the extent that a vendee holds equitable title only insofar as he has made payments on the purchase price for the property and such equitable title as passes to a vendee under such a contract terminates immediately upon his default in the performance thereof.

As was stated in *California Delta Farms v. Chinese Farms*, 207 Cal. 298, 278 Pac. 227:

“the equitable doctrine that the vendee, under a contract of sale, is the owner of the property applies only to the payments made on the purchase price; the full equitable title matures only upon the full payment of such price.”

The rule is well stated in the case of *Whittier v. Stege*, 61 Cal. 238, wherein, at page 241, the Court said:

“When therefore the defendants, after they had obtained possession lawfully, substituted repudiation of the contract and refusal to comply with its terms, for performance or willingness to perform, they di-

vested themselves by their wrongful act of the equitable estate which they acquired under the contract and became trespassers or tenants at will, against whom their repudiated vendors could maintain ejectment.”

And again, to the same effect, the Court held, in *Fisher v. Chaffee*, 49 Cal. App. (2d) 100, 121 P. (2d) 51, as follows:

“It follows under these established rules that, having refused to further perform the contract, these vendees could not invoke or rely upon the terms of the contract against the vendor. The vendor was therefore free to maintain an action in ejectment to recover possession of this land.”

In the case of *Mayer v. West*, 96 Cal. App. 31, 273 Pac. 849, the Court, after reviewing many authorities on this question, said:

“It is elementary that a vendor may recover possession in ejectment from a vendee who repudiates his contract.”

And in *Andrews v. Karl*, 42 Cal. App. 512, 183 Pac. 838, it was held:

“Where a vendee in possession has refused to complete the contract, he may be treated as one who has abandoned the contract under which he entered.”

And in *Woodward v. Hennegan*, 128 Cal. 293, 60 Pac. 769, it was held:

“When a vendee has repudiated the contract and has refused to pay anything further upon it, the vendor is entitled to take possession and proceed to clear his title, and is no longer bound by the provisions of the contract.”

This Court, in a recent case, *Fed. Farm Mortgage Corp. v. Davis*, 132 F. (2d) 663, also passed on this question. That case involved a contract for the purchase of land where vendee entered into possession of the property but failed to comply with the provisions of the contract with respect to payments and taxes, and vendor notified them that the agreement was cancelled and all their rights thereunder terminated. Vendor commenced a suit in ejectment in the State Court. A short time later, vendee filed a petition in bankruptcy, listing the land in question as an asset. The vendor moved to strike the same from the bankruptcy schedule. The motion was denied by the Commissioner and, on review, the District Judge upheld the Commissioner's order. This Court, in reversing the District Judge, through Mr. Justice Healy, said in part as follows:

"In ruling on the motion, the Court relied on Section 3275 of the California Civil Code, and on our opinion in *Neely vs. Gunning*, 124 Fed. 7. We think the ruling was error. The California Courts appear not to apply the quoted statute to forfeitures of installment contracts for the purchase of land where time is of the essence. In the very recent case of *Ballard v. MacCollum*, 15 Cal. 2d 439, 101 P. 2d 692, the Supreme Court observed: 'In this State, by a long line of decisions, we have recognized such forfeitures in installment contracts for the purchase of land and in conditional sale of goods. * * * The leading case on the subject in this jurisdiction is *Glock v. Howard & Wilson*, 123 Cal. 1, 55 P. 713.'"

This Court quoted with approval from the *Glock* case and *Whittier v. Stege*, *supra*, and then continued:

"We conclude that, upon the forfeiture of this contract for the default of the vendees, the latter ceased

to have any interest, legal or equitable, in the land, and the continued possession was therefore without right.”

This Court had occasion to again pass on this question in the very recent case of *Starr King School for the Ministry v. Kinne*, 146 F. (2d) 8. The Court, on page 9 of its opinion, said in part as follows:

“This Court, in *Fed. Farm Mortgage Corporation v. Davis*, 132 Fed. 2d 663, decided the California law with respect to the termination of contracts for sale of land on installment payments containing the provisions of the instant contract set forth above. We there held that law to be that, on the non-payment of installments when due, the vendor could, by notice, terminate the contract and that the vendee was not entitled to notice of a future termination with right to make compensation in full and thereby acquire title to the land. * * * Since the contract was terminated before the petition in bankruptcy was filed, the estate in bankruptcy acquired no interest in the lands in question and the District Court erred in affirming the order of the Conciliation Commissioner. The order is reversed and the case remanded for proceedings in accord with this opinion.”

A petition for a writ of certiorari in this case was denied by the U. S. Supreme Court on April 30, 1945, 89 *Law Edition* 1970, 325 U. S. 50.

From the above, we do not believe the District Court had any jurisdiction to determine the matter involved in

this appeal. It has been stated many times that the test of jurisdiction to determine a matter in controversy between a trustee in bankruptcy and a third person is the necessity of doing so, in order to administer the estate. No such necessity existed here. The Trustee could have appeared and filed his answer to appellant's action in the State Court. If he were successful, whatever he received would belong to the bankrupt's estate and would be administered by the Bankruptcy Court. If he lost, the matter would be at an end. The Trustee bases his contention that the Bankruptcy Court had summary jurisdiction to grant specific performance in this case solely on the ground that bankrupt had possession of the property at the time the petition in bankruptcy was filed. We submit that this record shows conclusively that the bankrupt did not have legal possession. He had no right to the property. He was a mere trespasser. The Court, in the case of *In re Logan* (D. C. N. Y.), 196 Fed. 678, said:

“Of course mere possession is not enough. The finding must be, and the facts must warrant the finding, that the bankrupt, was the true owner.”

For the reason that bankrupt did not have legal possession or legal or equitable ownership of the property and because a summary action was not necessary to administer the bankruptcy estate, we submit that Bankruptcy Court did not have jurisdiction in this matter. The appellant was entitled to have the matter determined in a plenary action.

AS TO ALL ISSUES.

Specifications of Error XII and XIII.

(F) This is an equitable action for specific performance. We do not believe that any equitable grounds were pleaded or proved which warrant the Referee and the District Judge in so ordering. The provisions of the contract between the parties here were clearly disregarded. No effect was given to the significance of the "time is of the essence" and "condition precedent" clauses nor the provisions which automatically terminated and cancelled all rights of the vendee under the contract, upon his default. We believe it is the universal rule that a person seeking the extraordinary powers of a court of equity must not only plead but also must clearly prove that cogent equitable grounds exist to justify such a request. In his petition for an order to show cause, the Trustee at best stated facts which might, if true, constitute a legal cause of action; certainly not an equitable one. We believe the equities here are entirely with the appellant. She, in good faith, attempted to sell an improved business property which she owned to the bankrupt vendee under a sales contract. The vendee went into possession of the property in July 1945, on the payment of a very nominal sum. He made only two subsequent monthly payments when he defaulted. The total amount of all the payments paid by the bankrupt Hill to the appellant is much less than the reasonable rental value of the property for the period appellant has been deprived of its use. She has been forced to undertake prolonged and costly litigation to es-

tablish her rights. While there is no evidence in the record, anyone with a knowledge of human nature would know, by the very existence of this litigation, that the property involved has increased in value, and we think that the record clearly shows that two strangers to the contract, namely Bruno and Berg and the Angelus Escrow Service Corporation, were attempting to speculate with the property of this appellant. The order of the Referee and the District Judge decreeing specific performance in effect orders the vendor to do things which she no way at any time agreed with anybody to do. This is ordered, on the petition of a Trustee who did not allege, let alone prove, that the bankrupt he represented performed his covenants and agreements according to the terms of the contract. In fact, he admits that his bankrupt was in default. An original Findings of Fact of the Referee contained the following statement:

“The said George T. Goggin did ascertain that there was a substantial equity in and to the said real property above the balance due to the respondent, Jennie Wuchner.”

The Referee subsequently, on his own motion, eliminated the above sentence from his findings, and it is not now in the record. We believe however, the motive it discloses is pertinent.

ATTORNEYS' FEES.

Specifications of Error XIV.

(G) The contract involved in this appeal provides in the 4th paragraph thereof [Tr. 98] as follows:

“If action be instituted on this contract, buyer to pay such sum as the Court may fix as attorneys' fees, whether such action progresses to judgment or not.”

In instituting this action, we believe that the Trustee is bound by the provisions of the contract made for the benefit of the vendor and that the appellant, under the above quoted provision of the contract, is entitled to recover from the Trustee reasonable attorneys' fees which she had to expend in the defense of the action of the Trustee before the Referee in Bankruptcy and the District Judge, and for prosecution of the appeal to this Court. We respectfully suggest to the Court that the sum of Two Thousand Five Hundred (\$2,500.00) Dollars is a reasonable fee for the services performed by the attorneys for appellant.

Conclusion.

It is submitted that the order of the District Judge upholding the Order and Findings of Fact and Conclusions of Law of the Referee should be reversed on the ground that bankrupt vendee did not pay to the appellant the amount of her demand of February 5, 1946, and that no proper offer of payment or tender of the amount of appellant's demand was made to her by vendee Hill or anyone on behalf and with the assent of said Hill. That because said vendee Hill had no legal or equitable title to the property or legal possession thereof, at the time the petition in bankruptcy was filed, the Bankruptcy Court

had no jurisdiction to try or hear the proceedings, and that the petition of the Trustee for an Order to Show Cause *re* Jennie Wuchner should be dismissed and the real estate involved herein should be ordered stricken from the schedule of assets of said bankrupt Hill, and that appellant be awarded her costs of suit and attorney fees incurred in the lower court and her costs and attorney fees incurred in this appeal.

Respectfully submitted,

WILLIAM W. BEARMAN,

RAYMOND B. McCONLOGUE,

By RAYMOND B. McCONLOGUE,

Attorneys for Appellant.

No. 11878.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JENNIE WUCHNER,

Appellant,

vs.

GEORGE T. GOGGIN, TRUSTEE IN BANKRUPTCY OF THE
ESTATE OF CHARLES E. HILL, doing business as Hill
Machine Tools,

Appellee.

APPELLEE'S BRIEF.

GENDEL & CHICHESTER,
810 James Oviatt Building, Los Angeles 14,
Attorneys for Appellee.

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No. 11878.

IN THE
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JENNIE WUCHNER,

Appellant,

vs.

GEORGE T. GOGGIN, TRUSTEE IN BANKRUPTCY OF THE
ESTATE OF CHARLES E. HILL, doing business as Hill
Machine Tools,

Appellee.

APPELLEE'S BRIEF.

*To the Honorable Judges of the United States Circuit
Court of Appeals, for the Ninth Circuit:*

Comes now George T. Goggin as trustee and appellee
in the within bankruptcy, and in reply to the appellant's
opening brief, respectfully states as follows:

Statement of the Case.

Because there are important omissions from the state-
ment of facts appearing in the appellant's opening brief,
the appellee deems it necessary to include herein a separate
statement of the facts involved on this appeal.

By a written agreement dated June 5, 1945, for the sale
of real estate [Tr. 96-100] the appellant agreed to sell and

Charles E. Hill agreed to buy a certain parcel of real estate in the city of Redondo Beach, county of Los Angeles, state of California, more particularly described in said agreement, for the sum of \$5500.00. Pursuant to the agreement \$350 was paid by the vendee upon its execution, and the balance was to be paid in monthly installments of \$200 or more on or before the first day of each calendar month.

The following portions of the said agreement are relevant to the questions presented on this appeal:

“Should default be made in payment of any installment when due the whole sum of principal and interest shall become immediately due at the option of the seller. If action be instituted on this contract, buyer to pay such sum as the Court may fix as attorney’s fees whether such action progress to judgment or not.

The buyer shall be let into, and have immediate possession of said premises, but the buyer shall make no changes or alterations in or to any of the buildings now on said premises, nor remove any portion thereof, without the consent of the seller therefore, until after the sum of Fifteen Hundred Dollars (\$1500.00) has been paid on the principal sum of the purchase price herein specified; and it is agreed that time is the essence of this contract, and in the event of failure to comply with the terms hereof by said buyer, then the seller shall be released from all obligations of law and equity to convey said premises, and the buyer shall forfeit all right thereto and to all money theretofore paid under this contract; but the said seller on receiving full payments, at the time and in the manner above mentioned, agrees to deliver to the said buyer a policy of Title Insurance showing

the title to said property to be vested in the seller, free of incumbrance except as above stated and to execute and deliver to the said buyer, or assigns, a good and sufficient deed of grant, bargain and sale.

It is further agreed that immediately after said Fifteen Hundred Dollars (\$1500.00) has been paid on the principal sum due herein, seller agrees to deliver to said buyer, a policy of Title Insurance showing the title to said property to be vested in the seller free of incumbrances except as above stated, or as may be created or suffered by buyer and to execute a good and sufficient deed to the buyer and the buyer agrees to execute to seller a note secured by a trust deed on the premises for the balance due under this contract, payable in installments of Fifty Dollars (\$50.00) or more per month, with interest at the rate of 6% per annum.

* * * * *

It is further agreed that any default shall not become effective for thirty days (30) from date of said default.

/s/ Mrs. Jennie Wuchner, Seller,
/s/ Charles E. Hill, Buyer."

In addition to the \$350 paid upon the execution of the agreement, the vendee paid the monthly installments of \$200 for the months of August and September, 1945. [Tr. 100, 144.] On February 5, 1946, the appellant-vendor mailed the following written notice to the vendee [Tr. 101]:

"To CHARLES E. HILL:

You will please take notice that the undersigned, Jennie Wuchner, designated as the 'seller' in that certain agreement drawn between the undersigned as

'seller' and Charles E. Hill as 'buyer' on the 5th day of June, 1945, providing for the sale and purchase of real property located in Redondo Beach, County of Los Angeles, State of California, as more particularly described in said agreement, hereby notifies you:

That there having been default in the payment of installments provided for in said agreement on the part of the buyer, the seller hereby exercises the option contained therein and declares the whole amount of principal and interest now due and unpaid under said agreement namely the sum of \$4,912.63 due and hereby demands that you pay forthwith to the seller the said sum of \$4,912.63, being the principal and interest now due and unpaid.

Dated this 5th day of February, 1946.

/s/ MRS. JENNIE WUCHNER."

On February 11, 1946, in reply to the said notice, there was sent to the vendor the following letter [Tr. 115]:

"Dear Mrs. Wuchner:

In accordance with our previous letter to you and in accordance with your demand of February 5, 1946, directed to Mr. Charles E. Hill referring to the purchase agreement between yourself and Charles E. Hill covering the property at 732 North Pacific Avenue in Redondo Beach, more particularly described in the agreement of June 5th, 1945, to which reference is hereby made, we have prepared the instructions for your signature and ask that if you will execute them, and return to us we shall be pleased to order the policy of title insurance from such company as you prefer or if you have no preference we shall order it from the Title Insurance and Trust Company of Los Angeles, forwarding you a copy of the preliminary report.

This is to advise you that there is on deposit at this time the full amount of your demand of \$4912.63 subject to the escrow instructions for clear title as therein set forth.

Awaiting your instructions and pleasure.”

The letter was signed by H. F. Poyet, president of the Angelus Escrow Service Corporation.

There was transmitted with the above letter escrow instructions in the usual form [Tr. 118-123] which were duly signed as follows:

“Charles E. Hill, by Dora M. Hill, his attorney-in-fact.”

and it was stipulated that Dora M. Hill was the appointee under a written and duly executed power of attorney dated November 6, 1945, signed and acknowledged by Charles E. Hill. [Tr. 139-140.] The escrow instructions so signed by the vendee provided that upon receipt from the vendor of a grant deed and a policy of title insurance on the property in question, the escrow holder was to pay the sum of \$4,912.63 to the vendor.

The vendor-appellant did not sign the escrow instructions but returned them to the sender on February 14, 1946, with a letter reading as follows [Tr. p. 115]:

“Mr. H. F. Poyet
Attorney at Law
114 Pier Avenue
Hermosa Beach, California

I am returning herewith Escrow Instructions No. 32, in the same condition in which they were received.

Non-compliance with the terms of the contract entered into by Jennie Wuchner and C. E. Hill, cov-

ering sale and purchase of property described in the contract, has caused same to be forfeited and cancelled.

Yours very truly,

/s/ Mrs. Jennie Wuchner."

In the interim on February 8, 1946, the vendor-appellant sent a second notice to Charles E. Hill, providing in part as follows [Tr. p. 109]:

"To Charles E. Hill:

You are hereby notified that by reason of the default by you in the payment of installments provided for in that certain agreement in writing made and entered into on or about the 5th day of June 1945 by and between yourself and the undersigned, Mrs. Jennie Wuchner, providing for the sale and purchase of that real property in the city of Redondo Beach * * *

That the undersigned hereby declares said contract forfeited and cancelled.

Dated this 8th day February, 1946.

MRS. JENNIE WUCHNER."

The sum of \$4,912.63, which was referred to in the said letter of February 11, 1946, was deposited in a separate, but related escrow opened the same date, the instructions for which (in so far as they are here relevant) read as follows [Tr. 136-137]:

"Referring to the escrow instructions of Charles E. Hill in the above numbered escrow which instructions are made a part of this instruction by reference, we the undersigned hand you the sum of \$4912.63 which you are to use when you can comply with the

foregoing instructions of Charles E. Hill purchasing the property therein described free of liens or encumbrances as therein set forth and in addition thereto you will record for us concurrently with the deed from Mrs. Jennie Wuchner to Charles E. Hill a deed from Charles E. Hill and Dora Hill his wife to Frank Bruno and Teddy Berg to the above described property you will have the title showing free and clear of encumbrances said property in Frank Bruno and Teddy Berg * * *

/s/ FRANK BRUNO
/s/ TEDDY BERG.

I, Charles E. Hill, agree to execute the deed in accordance with the foregoing instructions and agree to comply therewith.

CHARLES E. HILL,
By /s/ DORA M. HILL,
His Attorney in Fact."

Charles E. Hill, the vendee under the aforementioned contract to sell, went into possession of the property upon the date of execution of the contract and remained in possession at all times thereafter [Tr. 82, 153], and the vendor-appellant was not in possession of the property at any time after June 5, 1945. [Tr. 83, 153.]

On February 19, 1946, the vendor-appellant filed an action in the Superior Court in and for the County of Los Angeles, State of California, seeking to quiet the vendor's title to the property in question, and to foreclose and forfeit all rights of the vendee in and to the said property, the money theretofore paid, and the contract of sale. The defendants to said action were Charles E. Hill and his wife. The defendants were served with a copy of the summons and complaint, but by stipulation

between the parties to the action no answer was filed and no further proceedings were had therein. [Ref. Finding No. 6, Tr. 40, which was and is not now disputed by appellant.]

On February 27, 1946, an action was filed by Charles E. Hill and his wife in the Superior Court of the State of California, in and for the County of Los Angeles, against the appellant herein, seeking declaratory relief to the extent that the said agreement should not be declared forfeited, and also seeking damages against the appellant vendor. In this action a demurrer was filed, and after certain hearings the defendant therein, who is the appellant herein filed an answer, and no further proceedings were had in said action. [Tr. 40.]

On April 5, 1946, an involuntary petition in bankruptcy was filed against said Charles E. Hill [Tr. 2-5], the vendee in the aforesaid agreement, and in said bankruptcy proceeding he was duly adjudicated a bankrupt [Tr. 8]; George T. Goggin, appellee herein, was thereafter appointed Trustee in Bankruptcy of the estate of said Charles E. Hill.

On June 10, 1946, the said trustee-appellee filed in the bankruptcy court a petition for an order to show cause against the vendor-appellant, requiring her to appear and show cause why an order should not be entered decreeing the aforesaid agreement of sale to be in full force and effect. An order to show cause was issued on the said petition and an answer thereto was filed by the appellant.

On June 28, 1946, the appellee tendered to appellant the sum of \$5,035.43 representing the entire unpaid balance, together with interest to that date under the aforesaid

agreement to sell. [Tr. 102.] On July 1, 1946, the appellant, in writing, rejected the aforesaid tender, the appellant contending that the aforesaid agreement for the sale of real estate had been forfeited and cancelled. [Tr. 105.]

On July 3, 1946, with leave of court, an amended petition was filed concerning the same matter, by the trustee, and an order to show cause issued thereon to which the appellant filed her answer. [Tr. 10, 11.] This amended petition and the order to show cause thereon constitute the trustee's pleadings herein.

The appellant objected to the jurisdiction of the bankruptcy court to determine the controversy, and the jurisdictional objection was overruled. After several hearings the Referee made his Findings of Fact [Tr. 36], and conclusions of law [Tr. 42] and based thereon entered an order [Tr. 44] by the terms of which the appellee was declared to be the owner of the property in question, free and clear of any claims of appellant, and the appellant was ordered to make and deliver a grant deed to appellee upon the payment to appellant by appellee of the balance of the unpaid purchase price, together with interest. The appellant was also required to supply the trustee with a policy of title insurance pursuant to the terms of the written agreement. The appellant petitioned the District Court for a review of said order [Tr. 46-60] and the petition was denied. [Tr. 62.]¹ This appeal followed.

¹In denying the petition for review the District Court made a minor modification in the findings of fact. The order of the referee was also modified by striking the provisions stating that the trustee was the owner of the real property in question and substituting therefor the statement that the trustee "is entitled to a conveyance of the real property described." [Tr. 62, 63.]

Summary of Argument.

There are two questions presented on this appeal: Did the bankruptcy court have jurisdiction in a summary proceeding to determine the title to the real property in question?² If the answer to the first question be in the affirmative, the remaining issue is whether the Referee and the District Court correctly construed the facts and the law of the State of California in holding that the appellee was entitled to a conveyance of the property in question.

²While the authorities hereinafter discussed conclusively support the rulings of the referee and the District Court on the jurisdictional question, it should be noted that the appellant, through her counsel, seemingly consented to the jurisdiction of the bankruptcy court when he stated to the referee in open court upon the hearing of the petition on the order to show cause:

“All I want to say is this, whether this matter is to be tried here or in the State Court, all we want is our day in court.

“I might state very frankly the reason I am taking the position of not wanting to enter into any stipulations in this matter, with reference either to admitting jurisdiction of this Court or taking away any performed rights so far as my client is concerned, is this: Whatever Your Honor should rule—and I make those very points, furthermore, as to jurisdiction—whether it is in this department or whether it is in the State Court, I shall abide by that and be willing to try out the issues, either here or in the State Court. . . .” [Tr. 79.]

“And when Your Honor has ruled on the question of jurisdiction and given us our day in court, whether it is here or whether it is in the State Court, we will be willing to proceed.” [Tr. 80.]

The Bankruptcy Act specifically provides that jurisdiction may be conferred by consent. Bankruptcy Act, Section 23(b) (11 U. S. C., Chapter 4, Sec. 46b). See also:

2 Collier on Bankruptcy, 14th Ed., 508;

Matter of Prokop (C. C. A. 7th, 1933), 65 F. (2d) 628;

MacDonald v. Plymouth County Trust Co. (1932), 286 U. S. 263;

Harris v. Brundage Co. (1938), 305 U. S. 160.

The authorities hereinafter referred to demonstrate that the Referee and the District Court were correct in answering both questions in the affirmative. The rulings below should be affirmed on the following grounds:

1. The bankruptcy court had jurisdiction in a summary proceeding to determine the title to the real property in question because the bankrupt was in possession of the property upon the filing of the petition in bankruptcy.

2. Pursuant to the terms of the written agreement and by operation of law, the appellee was entitled to a conveyance of the property in question.

a. Upon default of the vendee in paying the installments when due, the appellant was put to an election of remedies, and a binding election was made by demanding the balance of the purchase price.

b. All past defaults of the vendee were waived by appellant.

c. The vendee made a valid tender of the purchase price, and thereby became the owner of the property.

d. The vendor having wrongfully rejected the tender, no further tender was necessary by the vendee.

e. The vendor having refused to accept performance before the offer thereof, no actual tender was required of the vendee.

The Bankruptcy Court Had Jurisdiction in a Summary Proceeding to Determine the Title to the Real Property in Question Because the Bankrupt Was in Possession of the Property Upon the Filing of the Petition in Bankruptcy.

At the time of the filing of the petition in bankruptcy the bankrupt was in actual possession of the real property in question. [Tr. 82, 83, 153.]

The cases hereinafter referred to demonstrate conclusively that all that is necessary to give the bankruptcy court jurisdiction is the possession—either actual or constructive—of the property in question by the bankrupt at the time of filing the petition in bankruptcy. If that fact is established, the bankruptcy court has jurisdiction to determine the rights of any parties in and to such property. While the appellant does not deny the possession of the bankrupt at the time the petition was filed, the untenable contention is made that the possession of the bankrupt was not “legal possession.”

This Court had occasion to consider a similar contention in the case of *Schultz v. England* (C. C. A. 9th, 1939), 106 F. (2d) 764, involving the question of title to certain fixtures and equipment, as between the lessor of the premises in which the fixtures and equipment were located and the trustee in bankruptcy for the lessee. At the time of the filing of the petition in bankruptcy, the lessee-bankrupt had been in possession of the premises, but the lessor contended that the lease was terminated by operation of law upon the filing of the petition in bankruptcy and the fixtures and equipment thereby became a part of the realty, the lessor contending that “there was neither lawful possession nor leasehold in-

terest which the bankrupt could pass to the trustee," which seems to be the point made by the appellant in the instant case. This court held that the bankruptcy court had exclusive jurisdiction to determine title to the fixtures and answered the contention as to "lawful possession" by saying (106 F. (2d) at 767): "This argument assumes to answer the very question involved."

With a single exception³ the cases cited by appellant on pages 49 to 53 of her brief wherein the appellant sets forth her argument on the jurisdictional question, are not in point. These decisions deal with the merits of the controversy between the vendee and vendor under installment contracts; none is concerned with the question of jurisdiction. Clearly a decision on the merits of the controversy is necessarily based upon a holding that there is jurisdiction in the court to determine the controversy. The numerous decisions of the California courts cited by appellant do not mention the question of the jurisdiction of a court of bankruptcy.

The cases of *Federal Farm Mortgage Corp. v. Davis* (C. C. A. 9th, 1942), 132 F. (2d) 663,⁴ and *Starr King School for the Ministry v. Kinne* (C. C. A. 9th, 1944), 146 F. (2d) 8, Cert. den. 325 U. S. 850⁵ both involved a situation where vendors under installment contracts for the sale of land voluntarily appeared in the bankruptcy proceeding and moved to strike from a schedule of assets the land involved in the installment contract, on the ground

³*In re Logan* (D. C. N. Y., 1912), 196 Fed. 678, referred to in appellant's opening brief at page 53. See *infra* note 6.

⁴Cited on page 51 of appellant's opening brief.

⁵Cited on page 52 of appellant's opening brief.

that the bankrupt's interest therein had been forfeited prior to the bankruptcy. No jurisdictional question was or could have been involved, for the reason that the vendors in both cases had voluntarily consented to the jurisdiction of the bankruptcy court by appearing therein and making their motion.

In the *Federal Farm Mortgage Corporation* case, *supra*, this Court refers to its earlier decision in the case of *Neeley v. Gunning* (C. C. A. 9th, 1941), 124 F. (2d) 7, where this Court had occasion to express itself on the jurisdiction of a court of bankruptcy to adjudicate rights under installment contracts for the sale of real estate as between the vendor and the bankrupt vendee, which is the identical question before the Court on this appeal. The Court states, at 124 F. (2d) 8:

“The bankruptcy court, by reason of the fact that the farm debtors have possession of the real and personal property covered by the contract has exclusive jurisdiction to determine the rights of the parties therein. Bankruptcy Act. §75, subs. (n), (o) (2), 11 U. S. C. A., §203, subs. (n), (o) (2), *supra*; *Ex parte Baldwin*, 291 U. S. 610, 615, 616, 54 S. Ct. 551, 78 L. Ed. 1020; *Thompson v. Magnolia Co.*, 309 U. S. 478, 60 S. Ct. 628, 84 L. Ed. 876. Section 75, sub. (n), *supra*, of the Bankruptcy Act expressly provides that contracts for purchase, or conditional sales contracts, shall be under the exclusive jurisdiction of the bankruptcy court. Bankruptcy Act, §75, sub. (n), 11 U. S. C. A., §203, sub. (n), *supra*.”

The case of *In re Logan* (D. C. N. Y., 1912), 196 Fed. 678, cited by appellant on page 53 of her brief, does

involve a question of jurisdiction of the Bankruptcy Court, which the court answered affirmatively. The two short sentences quoted by appellant from that decision, however, do not reflect the principle announced by the court in that case. The language quoted by appellant takes on a wholly different meaning when considered in the context of the portion of the opinion in which it is contained.⁶

6“ . . . under the decisions of the Circuit Courts of Appeal and the Supreme Court of the United States, the test of jurisdiction to proceed in a summary way or by a summary proceeding to determine controversies in regard to real or personal property is possession of such property in or by the bankrupt at the time of the filing of the petition and adjudication. *Of course, mere possession is not enough. The finding must be and the facts must warrant the finding that the bankrupt was the true owner, and that he held as owner.* Jurisdiction to proceed in this manner is not defeated by a claim of ownership made by a third person asserted for the first time after a petition in bankruptcy is filed, even though the groundwork for such a claim had been prepared beforehand. Should a bankrupt make, execute and deliver a formal bill of sale of personal property to another, retaining possession of the property, and agree with such person that he should hold title for the bankrupt until the termination of bankruptcy proceedings, the paper title thus held would be merely colorable, and it seems to me that a summary proceeding would be proper, even though both bankrupt and such vendee should claim that the bankrupt's possession was as agent or bailee of the person holding the bill of sale. I do not see that it makes any difference that the property in question is real estate and not personal property, and that the transfer of title is a deed, and not a bill of sale. Under such circumstances, it cannot be material that the deed was executed and delivered and recorded more than four months prior to the bankruptcy, nor can it be material that the deed of the property came from another party, the bankrupt paying the consideration therefor and the transaction being one intended to cover and conceal the bankrupt's property from creditors and the trustee in bankruptcy when appointed. It cannot be that a plenary suit in such case is necessary in order to reach the property. The property comes at once within the jurisdiction of the bankruptcy court and constructively into its possession, it being in possession of the bankrupt himself, and no claim adverse to the bankrupt having been made prior to the institution of the bankruptcy proceedings.” (196 Fed. at 688.) (Italics ours, representing portion quoted by appellant. See page 53, appellant's opening brief.)

The cases are legion to the effect that the governing test to be applied in determining whether a court of bankruptcy has jurisdiction in a summary proceeding to determine rights and interests with respect to property is whether or not there was possession by the bankrupt—either actual or constructive—at the time of the filing of the petition in bankruptcy. The cases on this point are so numerous that we shall only refer to controlling decisions of the United States Supreme Court, and decisions of this Court.

A Supreme Court decision which is particularly in point on the question of jurisdiction here involved is *Ex parte Baldwin* (1934), 291 U. S. 610, where Mr. Justice Brandeis, speaking for the Court, states at page 615:

“All property in the possession of a bankrupt of which he claims the ownership passes, upon the filing of a petition in bankruptcy, into the custody of the court of bankruptcy. To protect its jurisdiction from interference, that court may issue an injunction. The power is not peculiar to bankruptcy or to the federal courts. It is an application of the general principle that where a court of competent jurisdiction has, through its officers, taken property into its possession the property is thereby withdrawn from the jurisdiction of other courts. Having possession, the court may not only issue all writs necessary to protect its possession from physical interference, but is entitled to determine all questions respecting the same. *Julian v. Central Trust Co.*, 93 U. S. 93, 112; compare *Richl v. Margolies*, 279 U. S. 218, 223;

Straton v. New, 283 U. S. 318. The jurisdiction in such cases is exclusive of the jurisdiction of other courts, although otherwise the controversy would be cognizable in them. *Murphy v. Hoffman Co.*, 211 U. S. 562, 569. In bankruptcy, this rule applies regardless of whether the property is located in the district in which bankruptcy proceeding originated. The injunction to protect its possession may issue either from the court of original jurisdiction, or from the federal court for the district in which the state court suit is brought or in which the plaintiff in that suit resides. *Isaacs v. Hobbs Tie & Timber Co.*, 282 U. S. 734, 737-8.

“But the exclusive jurisdiction acquired by the bankruptcy court through taking possession of the interurban railway under claim of title, was not limited to the prevention of interference with the use of the land. Compare *Chicago Board of Trade v. Johnson*, 264 U. S. 1, 11; *Taubel-Scott-Kitzmiller Co. v. Fox*, 264 U. S. 426, 433. *The jurisdiction extends also to the adjudication of questions respecting title. White v. Schloerb*, 178 U. S. 542; *In re Eppstein*, 156 F. 42. Compare *Wabash R. Co. v. Adelbert College*, 208 U. S. 38, 54; *Security Mortgage Co. v. Powers*, 278 U. S. 149, 153.” (Emphasis added.)

These principles have been repeatedly restated by the Supreme Court in such cases as:

Taubel-Scott-Kitzmiller Co. v. Fox (1924), 264 U. S. 426.⁷

Thompson v. Magnolia Petroleum Co. (1940), 309 U. S. 478;⁸

Cline v. Kaplan (1944), 323 U. S. 97;⁹

Gardner v. New Jersey (1947), 329 U. S. 565.¹⁰

"By the Act of 1898, as originally enacted, the power of the bankruptcy court to adjudicate, without consent, controversies concerning the title, arising under either §67-e, or §60-b, or §70-e, was confined to property of which it had possession. The possession, which was thus essential to jurisdiction, need not be actual. Constructive possession is sufficient. It exists where the property was in the physical possession of the debtor at the time of the filing of the petition in bankruptcy, but was not delivered by him to the trustee, where the property was delivered to the trustee, but was thereafter wrongfully withdrawn from the custody; where the property is in the hands of the bankrupt's agent or bailee; where the property is held by some other person, who makes no claim to it; and where the property is held by one who makes a claim, but the claim is colorable only. As every court must have power to determine, in the first instance, whether it has jurisdiction to proceed, the bankruptcy court has, in every case, jurisdiction to determine whether it has possession, actual or constructive. It may conclude, where it lacks actual possession, that the physical possession held by some other persons is of such a nature that the property is constructively within the possession of the court.

Wherever the bankruptcy court had possession, it could, under the Act of 1898, as originally enacted, and can now, determine in a summary proceeding controversies involving substantial adverse claims of title under subdivision e of §67, under subdivision b of §60 and under subdivision e of §70." 264 U. S. at page 432.

⁸"Bankruptcy courts have summary jurisdiction to adjudicate controversies relating to property over which they have actual or constructive possession. And the test of this jurisdiction is not title in but possession by the bankrupt at the time of the filing of the petition in bankruptcy. . . . the jurisdiction thus acquired by the bankruptcy court 'extends . . . to the adjudication of questions respecting the title.' (*Ex Parte Baldwin*, 291 U. S. 610, 616." 309 U. S. at page 481.

⁹"A bankruptcy court has the power to adjudicate summarily rights and claims to property which is in the actual or constructive possession of the court. *Thompson v. Magnolia Petroleum Co.*, 309 U. S. 478, 481." 323 U. S. at 98.

¹⁰"That jurisdiction is not limited to the prevention of interference with the use of property by the trustee; it 'extends also to the adjudication of questions respecting the title.'" 329 U. S. at 577.

That actual or constructive possession by the bankrupt at the time of the commencement of the bankruptcy proceedings is the sole test applied in determining the jurisdiction of the bankruptcy court has been announced in numerous decisions of this Court:¹¹

Heffron v. Western Loan & Bldg. Co. (C. C. A. 9th, 1936), 84 F. (2d) 301;

City of Long Beach v. Metcalf (C. C. A. 9th, 1939), 103 F. (2d) 483;

Schultz v. England (C. C. A. 9th, 1939), 106 F. (2d) 764;

Neeley v. Gunning (C. C. A. 9th, 1941), 124 F. (2d) 7;

Bank of California v. McBride (C. C. A. 9th, 1943), 132 F. (2d) 769.

In closing the discussion of the jurisdictional question, we should like to refer to the statement of this Court in its decision in the *City of Long Beach v. Metcalf*, 103 F. (2d) at 486, where the rule is clearly and distinctly stated as follows:

“Appellee’s petition alleges that at the date of the filing of the petition in bankruptcy, the property in question was owned by, and was in possession of, the bankrupt. If so, the filing of the petition in bankruptcy brought the property into the custody of the

¹¹See also the learned opinion of Judge Jenney in the case of *In the Matter of American Fidelity Corporation* (D. C. Cal., 1939), 28 F. Supp. 462 at page 467.

bankruptcy court (*Acme Harvester Co. v. Beekman Lumber Co.*, 222 U. S. 300, 307, 32 S. Ct. 96, 56 L. Ed. 208; *Hebert v. Crawford*, 228 U. S. 204, 208, 33 S. Ct. 484, 57 L. Ed. 800; *Lazarus v. Prentice*, 234 U. S. 263, 266, 34 S. Ct. 851, 58 L. Ed. 1305; *Fairbanks Steam Shovel Co. v. Wills*, 240 U. S. 642, 649, 36 S. Ct. 466, 60 L. Ed. 841; *Ex parte Baldwin*, 291 U. S. 610, 615, 54 S. Ct. 551, 78 L. Ed. 1020), and, upon adjudication, title to the property, with actual or constructive possession, vested in appellee—the bankruptcy court's trustee—as of the date of the filing of the petition in bankruptcy. *Mueller v. Nugent*, 184 U. S. 1, 14, 22 S. Ct. 269, 46 L. Ed. 405; *Fairbanks Steam Shovel Co. v. Wills*, *supra*; *Isaacs v. Hobbs Tie & Timber Co.*, 282 U. S. 734, 51 S. Ct. 270, 75 L. Ed. 645.

“Thereafter, notwithstanding section 23, *supra*, the bankruptcy court, having possession of the property, had jurisdiction to hear and determine all questions respecting title thereto. *Murphy v. John Hoffman Co.*, 211 U. S. 562, 568, 29 S. Ct. 154, 53 L. Ed. 327; *Hebert v. Crawford*, *supra*; *Board of Trade v. Johnson*, 264 U. S. 1, 11, 44 S. Ct. 232, 68 L. Ed. 533; *Taubel-Scott-Kitzmiller Co. v. Fox*, 264 U. S. 426, 432, 44 S. Ct. 396, 68 L. Ed. 770; *Isaacs v. Hobbs Tie & Timber Co.*, *supra*; *Ex parte Baldwin*, *supra*. Whether such possession was actual or constructive is immaterial. Constructive possession was sufficient. *Taubel-Scott-Kitzmiller Co. v. Fox*, *supra*. We hold, therefore, that the bankruptcy court had jurisdiction of this proceeding.”

At the close of its opinion the court appropriately refers to the allegation of the bankrupt's possession as the "jurisdictional allegation."¹²

On the basis of the undisputed fact that the property in question was in the physical possession of the bankrupt at the time the petition in bankruptcy was filed, the authorities conclusively support the ruling of the Referee and the District Court that there was jurisdiction in the bankruptcy court to determine the rights of the parties to the property in question.

Pursuant to the Terms of the Written Agreement and by Operation of Law, the Appellee Was Entitled to a Conveyance of the Property in Question.

The controversy between the parties on the merits can be completely resolved by a consideration of the admitted facts without any apparent necessity for a determination of the disputed facts. The written contract between the appellant and the bankrupt contained the following clauses:

"Should default be made in payment of any installment when due, the whole sum of principal and interest shall become immediately due *at the option of the seller.*" (Emphasis added.) [Tr. 98.]

¹²"Appellants may, in their answer, deny any or all of appellee's allegations, including the jurisdictional allegation that the bankrupt was in possession of the property at the date of the filing of the petition in bankruptcy. Such denial, if made, will place on appellee the burden of proving the challenged allegations.

"If the jurisdictional allegation is proved by appellee or (hereafter) admitted by appellants, the referee should, and we assume that he will, then proceed to hear and determine the other issues raised by the petition and answer. If the jurisdictional allegation is not proved or admitted, the referee should, without considering any other issue, dismiss the proceeding." 103 F. (2d) at 487.

“Time is the essence of this contract, and in the event of failure to comply with the terms hereof by said buyer, then the seller shall be released from all obligations of law and equity to convey said premises, and the buyer shall forfeit all right thereto and to all monies theretofore paid under this contract.” [Tr. 98.]

“Any default shall not become effective for 30 days from date of said default.” [Tr. 100.]

The vendee under this contract had been in default for several months, and on or about February 5, 1946, the vendor sent the vendee a written notice whereby the vendor “exercises the option contained” in the contract and declared “the whole amount of principal and interest now due and unpaid” to be \$4912.63 and demanded said sum forthwith. By a written reply dated February 11, 1946, the vendee enclosed escrow instructions duly signed by him informing the vendor that there was deposited in escrow, for the vendor, the sum demanded in said notice. On February 8, 1946, appellant sent a written notice to the bankrupt declaring “said contract forfeited and cancelled.”

The authorities hereinafter discussed demonstrate that the first notice dated February 5th, whereby the appellant demanded the sum of \$4912.63 was pursuant to the express provisions of the contract and constituted a binding election, thereby making the purported declaration of forfeiture of February 8th a complete nullity.

At the outset appellee desires to make clear that he does not question the rule of *Glock v. Howard & Wilson Colony Co.*, 123 Cal. 1, and the cases cited by appellant following

the *Glock* case.¹³ As will be shown, the *Glock* case itself is authority in support of the rulings of the Referee and the District Court.

(a) **Upon Default of the Vendee in Paying the Installments When Due, the Appellant Was Put to an Election of Remedies, and a Binding Election Was Made by Demanding the Balance of the Purchase Price.**

In the *Glock* case the California Supreme Court refers to the rights of the vendor under a contract sued as that here involved, as follows (123 Cal. at p. 10):

“Upon the other hand, after the vendee’s breach of the covenant to pay, what are the vendor’s rights?

1. To stand upon the terms of his contract and sue

¹³There is a line of cases in the State of California allowing relief to the vendee from a forfeiture under the provisions of Section 3275 of the Civil Code of the State of California, seemingly ignoring the principle of the *Glock* case which did not mention this code section.

MacDonald v. Kingsbury (1911), 16 Cal. App. 244, 116 Pac. 380;

Troughton v. Eakle (1922), 58 Cal. App. 161, 208 Pac. 161;

Fickbohm v. Knaust (1930), 103 Cal. App. 443, 284 Pac. 692;

Ebbert v. Mercantile Trust Co. (1931), 213 Cal. 496, 2 P. (2d) 776.

For a thorough discussion of the development and status of the rule of *Glock v. Howard*, see NOTE: 27 Cal. L. R. 583.

The California State Legislature has codified the policy of giving relief from attempted forfeitures in the following Civil Code sections:

“§1442. FORFEITURES STRICTLY CONSTRUED. — A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created.”

“§3275. FROM FORFEITURE.—Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of grossly negligent, willful, or fraudulent breach of duty.”

for its breach under section 3307 of the Civil Code; 2. Still resting upon the contract, he may remain inactive, yet retain to his own use the moneys paid by the vendee; so that it is of no moment whether or not the contract declares that such moneys shall upon the breach be forfeited as liquidated damages; 3. Going into equity, still upon his contract, he may seek specific performance; or finally, if his generosity prompts him so to do, he may agree with the vendee for a mutual abandonment and rescission, in which last case, and in which last case alone, the vendee in default would be entitled to a repayment of his money.”

This statement has been construed by the California courts as putting the vendor to an election of remedies. For example, in the case of *Security-First National Bank v. Hauer* (1941), 47 Cal. App. (2d) 302, the court states at page 306:

“Upon the breach of any covenant by the vendees under a conditional sales agreement, plaintiffs are entitled to invoke either of two remedies: (1) To affirm the contract and sue for the balance of the purchase price, or (2) to terminate the contract, retain the money paid on the purchase price and repossess the property. (Glock v. Howard & Wilson C. Co., 123 Cal. 1 (55 Pac. 713, 69 Am. St. Rep. 17, 43 L. R. A. 199).) These remedies are inconsistent, and the election of one precludes the right to exercise the other. The vendor is not entitled to pursue both by declaring a forfeiture, retaining possession of the movable property described in the sales agreement together with cash payment already made, and by collecting future payments under the contract.”

Similarly in the instant case the appellant's notice to the vendee demanding the balance of the purchase price constituted an election to affirm the contract, which is wholly inconsistent with the attempted declaration of forfeiture purportedly invoked by the second notice.

While the contract involved in this case contained express provisions providing for the election of remedies, the established law of the State of California with respect to conditional sales contracts shows that there is an election of remedies even though the contract is silent on the subject.¹⁴

(b) All Past Defaults of the Vendee Were Waived by Appellant.

The strict forfeiture rule laid down in *Glock v. Howard*, *supra*, has led the California courts to adopt a liberal rule of waiver. Thus, in *Boone v. Templeman* (1910), 158 Cal. 290, 110 Pac. 947, there was involved an installment contract for the sale of land in which time was expressly made of the essence. The court states (158 Cal. at 295):

“These authorities make it clear that the acceptance of payment of installments on the price . . . , without objection long after they had become due, was a waiver of all the breaches which had occurred at or prior to the time such payments were actually

¹⁴*Holt Mfg. Co. v. Ewing* (1895), 109 Cal. 353;
Johnson v. Kaeser (1924), 196 Cal. 686, 239 Pac. 324;
Covington v. Lewis (1927), 83 Cal. App. 8, 256 Pac. 277;
Cocores v. Assimopoulos (1932), 127 Cal. App. 360, 15 P. (2d) 892;
Smith v. Miller (1935), 5 Cal. App. (2d) 651, 43 P. (2d) 347;
James v. Allen (1937), 23 Cal. App. (2d) 205, 15 P. (2d) 810.

made, and that he [the vendor] could not afterwards insist upon a forfeiture on account thereof . . . as to these breaches the forfeiture was waived."

This statement represents the settled law of California.¹⁵

While in the instant case there was no acceptance by the vendor of late payments, there was a demand by the vendor of the entire balance due under the contract in the notice of February 5, 1946. Clearly this was an express waiver of all past defaults.

The opinion in the case of *Boone v. Templeman* sets forth another ground which constitutes strong authority in support of the holding of the Referee and the District Court that the appellant had waived all defaults prior to the giving of the notice of February 5th. It is undisputed in the instant case that the vendee, notwithstanding his failure to pay the installments when due, continued in the undisturbed possession of the property for a period of approximately seven months during which six installments became due, but which were not paid. With respect to similar facts in *Boone v. Templeman*, the California Supreme Court stated (158 Cal. at 296):

"After the acceptance of the last sum paid, twenty-four additional payments of principal and interest fell due and were not paid, Boone [vendee] remaining in possession and Templeman [vendor] apparently acquiescing in the continuance of the contract, giving no notice to the contrary, not doing anything inconsistent therewith for still another period of four-

¹⁵*Hayt v. Bentel* (1913), 164 Cal. 680, 130 Pac. 432;
Hoppin v. Munsey (1921), 185 Cal. 678, 198 Pac. 398;
Beck v. Swank (1921), 55 Cal. App. 552, 203 Pac. 1010;
See Note (1924), 12 Calif. L. Rev. 438, 440.

teen months. We think from these facts a court might infer a waiver of the conditions regarding forfeiture and time and that they supported the general allegation of the complaint that Templeman had waived those conditions. The authorities with practical unanimity so hold.”

It follows, on the authority of *Boone v. Templeman*, that the appellant had waived the defaults occurring prior to the giving of the notice of February 5, and the waiver having been complete, the attempt to rely on the defaults in the notice of forfeiture given February 8, was of no avail.

(c) The Vendee Made a Valid Tender of the Purchase Price, and Thereby Became the Owner of the Property.

The appellant argues that the tender was insufficient for the reason that as a condition to receiving the money demanded the appellant was required to tender a deed and a policy of title insurance. A reading of the contract between the parties reveals that the vendor therein was obligated to deliver to the vendee “a policy of title insurance showing the title to said property to be vested in the seller free of incumbrance . . . and to execute and deliver to the said buyer, or assigns, a good and sufficient deed of grant, bargain and sale.” [Tr. 98.] The law of California on this question is clear. If the vendor demands the entire purchase price, the delivery of a deed and the payment of the balance of the purchase price become concurrent conditions. *Boone v. Templeman, supra*, is also the leading case in California on this question. There the principle is succinctly stated as follows (158 Cal. at 297):

“Where in a contract for the sale of land the price is made payable in installments at different times and

the deed is to be made when the whole is paid, the vendor may, upon failure to pay any intermediate installment, forthwith sue for its recovery. But if he allows the whole to become due, the payment of the price then becomes a dependent and concurrent condition, non-payment alone does not put the vendee in default, the vendor must tender a deed as a condition to demanding payment of the price, and he cannot, without such tender, declare a forfeiture, or maintain a suit either for the whole price, or for an intermediate installment. (*McCroskey v. Ladd*, 96 Cal. 459 (31 Pac. 558); *Russ v. Muscupiabe etc. Co.*, 120 Cal. 526, (65 Am. St. Rep. 186, 52 Pac. 995); *Glock v. Howard*, 123 Cal. 18 (69 Am. St. Rep. 17, 55 Pac. 713); *Underwood v. Tew*, 7 Wash. 297 (34 Pac. 1100); *Malaby v. Kuns*, 3 Ind. 398; *Gorham v. Reeves*, 3 Ind. 83; *McCulloch v. Dawson*, 1 Ind. 419; *Cunningham v. Gwinn*, 4 Blackf. (Ind.) 343, and cases cited in *McCroskey v. Ladd*, *supra*.”

This rule has been consistently followed by the California Courts.¹⁶

The other condition in the escrow instructions signed by the vendee which is now objected to by the appellant concerns the length of time the escrow was to remain open. Appellant contends that the escrow instructions required that the escrow remain open until May 6, 1946, thus deferring the payment of the money until that date. An

¹⁶*Hayt v. Bentel* (1913), 164 Cal. 680, 130 Pac. 432;
Lemle v. Barry (1919), 181 Cal. 6, 183 Pac. 148;
Kerr v. Reed (1921), 187 Cal. 409, 202 Pac. 142;
Bank of America v. Ries (1932), 128 Cal. App. 75, 16 P. (2d) 1018);
McCartney v. Campbell (1932), 216 Cal. 715, 16 P. (2d) 729;
Lifton v. Harshman (1947), 80 Cal. App. (2d) 422, 182 P. (2d) 222;
Hunt v. Mahoney (1947), 82 A. C. A. 598.

examination of the escrow instructions shows no reference whatsoever to a May 6th date. The instructions do state that the escrow is to remain open until May 1, 1946, and that the escrow holder is to pay over the money to the appellant "*on or before*" said date upon receipt from appellant of a grant deed and policy of title insurance.

Although the authorities above mentioned conclusively establish that the vendee's tender was a valid and proper one, had there been any defects in the tender, they would have been waived. There is nothing in the record to show that the appellant made any objection whatsoever to the tender, other than to state that the contract had been terminated. The objections which appellant now makes to the tender are made for the first time on this appeal.¹⁷ The law on this question has been codified in California. Section 1501 of the Civil Code of the State of California provides as follows:

"All objections to the mode of an offer of performance, which the creditor has an opportunity to state at the time to the person making the offer, and which could be then obviated by him, are waived by the creditor, if not then stated."

Section 2076 of the Code of Civil Procedure of the State of California provides as follows:

"The person to whom a tender is made must, at the time, specify any objection he may have to the

¹⁷Likewise appellant in her opening brief raises for the first time a claim for attorney's fees, and for this reason appellee does not deem it necessary to make any reply thereto. No such claim was made by appellant either in her answer to the petition on the order to show cause filed with the Referee [Tr. 22], in her objections to the findings of fact and conclusions of law of the Referee [Tr. 27], in the petition for review by the District Court [Tr. 46], or in her specification of the points to be relied upon on appeal [Tr. 161].

money, instrument, or property, or he must be deemed to have waived it; and if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms, or kind which he requires, or be precluded from objecting afterward.”¹⁸

Having tendered the amount demanded by the vendor-appellant to which tender the appellant made no objection, the vendee thereby became the owner of the property in question. This principle was announced by the California Supreme Court in the case of *Walker v. Houston* (1932), 215 Cal. 742, 12 P. (2d) 952. In that case an action was brought to foreclose a chattel mortgage. The defendants had purchased certain furniture on conditional contracts of sale and had executed a chattel mortgage to plaintiffs, which chattel mortgage covered the same furniture. The chattel mortgage was executed before the defendants had paid the purchase price called for by the installment contract of sale, but the chattel mortgage provided that it was only of the “equitable interest” of the mortgagors. Thereafter the defendants delivered the furniture to the warehouse of the conditional seller, although the defendants were not then in default under the contract. Subsequently, the defendants made a valid tender

¹⁸These code sections have been given full effect by the California courts.

Duncan v. Standard Accident Ins. Co. (1934), 1 Cal. (2d) 381, 390, 35 P. (2d) 523;

Backus v. Sessions (1941), 17 Cal. (2d) 380, 389, 110 P. (2d) 51;

Beeler v. American Trust Co. (1944), 24 Cal. (2d) 1, 28, 147 P. (2d) 585;

Smiley v. Read (1912), 163 Cal. 644, 126 Pac. 486;

Julian v. Gold (1931), 214 Cal. 74, 80, 3 P. (2d) 1009;

Hosson v. City of Long Beach (1948), 83 A. C. A. 966, 189 P. (2d) 787.

to the vendor under the conditional sales contract, which was refused. The Court states the following with respect to the effect of the tender made by the vendees (215 Cal. at 746):

“In our opinion, there is no doubt that the title of the conditional seller is an ‘incident’ of the obligation to pay the balance of the purchase price, which is discharged upon a tender of said balance. It is true that the cases previously cited deal with liens. Nevertheless, the title reserved by a conditional seller for the purpose of securing payment of the purchase price is no less an incident of an obligation to pay money than a mortgage or pledge. The title is reserved for security only. The buyer has the full right of possession and use unless he defaults, and may secure title by performance of this obligation without any further assent by the seller. The sole interest of the seller is in the receipt of the price, and his reserved title cannot be used for any other purpose. Hence it follows that tender of the balance of the price should have the effect of discharging the title of the seller and vesting such title in the buyer, and it has been so held. (Davies-Overland Co. v. Blenkiron, 71 Cal. App. 690 (236 Pac. 179); Dame v. C. H. Hanson & Co., 212 Mass. 124 (Ann. Cas. 1913C, 329, 40 L. R. A. (N. S.) 873, 98 N. E. 589); National Cash Register Co. v. Wapples, 52 Wash. 657 (101 Pac. 227).)”

This principle has been followed by the California Courts in analogous cases involving real estate.¹⁹

¹⁹*Sondel v. Arnold* (1934), 2 Cal. (2d) 87, 39 P. (2d) 793;
Wagner v. Shoemaker (1938), 29 Cal. App. (2d) 654, 85 P. (2d) 229;
Brooks v. Fidelity Savings & Loan Assn. (1942), 54 Cal. App. (2d) 130, 128 P. (2d) 711;
Hossom v. City of Long Beach (1948), 83 A. C. A. 966, 189 P. (2d) 787.

**(d) The Vendor Having Wrongfully Rejected the Tender,
No Further Tender Was Necessary by the Vendee.**

The present readiness and willingness of the appellee to pay the balance due, upon a sufficient tender being made by the appellant, is demonstrated by the check for all moneys due, with interest, which was sent to appellant by the appellee. [Tr. 102.] Upon rejection of the check by appellant the said check has been filed with the Bankruptcy Court. [Tr. 62.] However, after appellant rejected the tender originally made by the vendee, no further tender was necessary, the appellant having indicated that any further tender would be refused. A tender need not be kept open when it appears that it will not be accepted.²⁰

**(e) The Vendor Having Refused to Accept Performance
Before the Offer Thereof, No Actual Tender Was Re-
quired of the Vendee.**

After the appellant's notice of February 8, 1946, attempting to declare a forfeiture, the appellant has consistently maintained the alleged right of forfeiture and has continued to reject binding offers of performance by the bankrupt and the appellee. The appellant has therefore clearly placed herself within the scope of Section 1515

²⁰*Hoppin v. Munsey* (1921), 185 Cal. 678, 198 Pac. 398;
Bogue v. Roeth (1929), 98 Cal. App. 257, 276 Pac. 1071;
Ratterree Land Co. v. Security-First Nat'l Bank (1938), 26
Cal. App. (2d) 652, 80 P. (2d) 102;
Wagner v. Shoemaker (1938), 29 Cal. App. (2d) 654, 85 P.
(2d) 229;
Hosson v. City of Long Beach (1948), 83 A. C. A. 966, 189
P. (2d) 787.

of the Civil Code of the State of California, reading as follows:

“§1515. REFUSAL BEFORE OFFER—RETRACTION.
—A refusal by a creditor to accept performance, made before an offer thereof, is equivalent to an offer and refusal, unless, before performance is actually due, he gives notice to the debtor of his willingness to accept it.”

This fundamental rule of law represents the approach to this problem which was taken by the Referee and the District Judge. The appellant has no equities in her favor, particularly in view of the renewal of the tender made by the bankrupt through the check of the trustee, including full interest to the date of the trustee's tender, and the rejection thereof by the appellant for the apparent reason that she felt that the property might bring a higher price if repossessed by her. Under these circumstances the appellant should not be entitled to retain the monies paid on account by the bankrupt, obtain the return of the real property, and thereby deprive the creditors in the within estate from realizing upon any equity available in the real property. All arguments with reference to proper tender or any offer on the part of the bankrupt or the trustee to comply with the terms of the contract would be completely answered by the application of Civil Code Section 1515, but, as has been hereinbefore demonstrated, this is but one of several grounds sustaining the position of the courts below.

Conclusion.

On the basis of the record in this case, it is clear that the Referee and the Trial Court correctly ruled that there was jurisdiction in the bankruptcy court to adjudicate the rights of the parties to the property in question, and that on the merits it was correctly decided that the appellee herein was entitled to a conveyance of the property.

Wherefore, appellee prays that the order of the District Court affirming the Referee, be affirmed by this Court.

Respectfully submitted,

GENDEL & CHICHESTER,

By MARTIN GENDEL,

Attorneys for Appellee.

No. 11878

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JENNIE WUCHNER,

Appellant,

vs.

GEORGE T. GOGGIN, Trustee in Bankruptcy of the Estate
of Charles E. Hill, Doing Business as Hill Machine
Tools,

Appellee.

APPELLANT'S REPLY BRIEF.

FILE

JUN 15 1946

PAUL P. O'BRIEN,

CLERK

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APPELLANT'S REPLY BRIEF.

Statement.

It is to be noted that appellee, in his discussion of the merits of this controversy, commencing on page 21 of his brief, in no way attempts to uphold or justify the Findings of Fact and Conclusions of Law of the Referee and Judge, and does not traverse appellant's claim that they are not supported by the evidence, are against the evidence, and that therefore the order of the District Judge, based on such findings, is error.

It is also to be noted that appellee does not attempt to answer appellant's contention that a waiver, to be relied upon, must be pleaded and proved. Instead, it now appears from appellee's brief, that he is adopting a new theory, viz. Election of Remedies, to bolster his claim to this property.

ARGUMENT.

The Sole Issue Before the Court in This Case Is Whether Appellee Made a Legal Tender of the Money Due Appellant Under Her Demand of February 5, 1946.

What we are concerned with here is a petition of a Trustee of a bankrupt vendee, admittedly in default of his obligations under a real estate contract, asking a Court of Equity to decree specific performance against the vendor, and this without making any showing, either by way of pleading or proof, to excuse or explain the breach.

The appellee blandly insists that appellant, after effective defaults on the part of the vendee, both as to the monthly payments and taxes, by demanding the total sum due, waived all previous defaults and the effect of such defaults. As the record before this Court now stands, it is admitted that the bankrupt vendee was in default for five monthly payments amounting to \$1,000.00 and in default for the non-payment of the taxes on the property. It is admitted that such defaults became effective thirty days after the installment payment was due. It is admitted that vendor had a lawful right, by reason of an effective default, to demand immediate payment of the entire sum due. It is admitted that she made an effective demand for said total sum.

Up to this point, there is no disagreement, but from this point on appellee attempts to develop a theory which we believe is not only illogical but untenable. The only possible way vendor acquired the right to demand immediate payment was by vendee's default. Vendee now contends that, by her exercising that right, she waived past defaults, including the non-payment of taxes; that by the exercise of this lawful right the contract was

reinstated and was in full force and effect and binding on both parties. We do not believe it is necessary to cite to the Court any additional authorities for the proposition that, on February 5, 1946, all the rights of the vendee under this contract were canceled and terminated and under the terms of the contract, in this case, no affirmative act on the part of the vendor was necessary to accomplish this. No notice to the vendee was required, and no notice was necessary as the vendee had specifically agreed to this event by the terms of the written contract itself. No act of the vendor could breathe life into this contract so far as the vendee was concerned. If appellee's theory in this regard is pursued to its logical conclusion, it reduces itself to an absurdity.

Under the law of *Glock v. Howard and Wilson*, 123 Cal. 1, upon the vendee's failure to pay the installments when due, and to pay the taxes, all his rights under the contract were terminated and canceled.

If at this point in the proceedings vendor had brought an action in ejectment against the vendee, the vendee could not have maintained, without equitable excuse, a defense to the action and summary judgment would have been given vendor. *Skookum Oil Company v. Thomas*, 162 Cal. 539; *Connolly v. Hingley*, 82 Cal. 642; *Barcroft v. Livacich*, 35 Cal. App. (2d) 710. And if such action were brought, it could not be successfully contended that, by so doing, the vendor waived the defaults which gave right to the action. The notice given by appellant to appellee, on February 8, 1946, simply notified the vendee that all his rights under the contract had been canceled and terminated by reason of his own defaults.

After the rights of the vendee under the contract were thus terminated and canceled by reason of the

defaults of the vendee, the appellant vander had a choice of remedies given her by the contract. She chose to demand the entire amount due, payable at once. By so doing, she did not waive anything. She wanted this transaction terminated. She chose the most equitable remedy available to her. It gave the vendee an opportunity to pay the agreed price and obtain a deed and title to the property. It did not attempt to forfeit any of the money that he had paid in under the contract, as it gave him full credit for all sums he had previously paid. It is admitted that bankrupt vendee did not meet this demand by payment and it leaves the sole question to be decided by this Court, on the merits of the controversy, did vendee's actions on February 11 amount to a legal offer or tender of payment.

The appellee does not attempt to answer the contention of appellant that, under the provisions of the Civil Code cited by appellant in her opening brief, no valid tender was made.

The case of *Boone v. Templeman*,¹ 158 Cal. 290, 110 Pac. 947, cited and relied upon by appellee, has no bearing

¹The opinion in this case is on a ruling sustaining a general demurrer. The sole question presented was the sufficiency of the facts stated in the complaint to constitute a cause of action. It was an action to enforce specific performance of a contract, for the sale of land, against the vendor. The contract was executed October 17, 1901, and provided for the balance of the purchase price, amounting to \$2,150.00, to be payable in monthly installments of \$50.00 each, to be paid on the 5th day of each month. Although time was made of the essence, vendee paid only the first installment on time. While sixty-four months passed vendee made but five payments totaling \$700.00 and no protest was ever made by seller concerning such contempt for the obligation to pay on the 5th day of the month. In July 1906, without previous notice, seller served notice of rescission. The vendee offered to pay the entire balance due. The Court held that seller's offer to pay the entire balance must be accepted for the reason that vendor

on the facts of this case. Neither does the case of *Security-First National Bank v. Hauer*,² 47 Cal. App. (2d) 302, cited by appellee at page 24 of his brief.

had waived all breaches which had occurred at or prior to the times such payments were made and for that reason was estopped to insist on a forfeiture of the contract. The Court said, "We think, from these facts, a Court might infer a waiver of the conditions regarding forfeiture and time, and that they supported the general allegation of the complaint that Templeman had waived those conditions." All that *Boone v. Templeman* holds is that a vendor may waive the default of a vendee, and in that particular case the complaint alleged facts which, if proven, would constitute waiver. At page 299 of the case, the Court said: "In the case at bar, upon the facts shown by the complaint, a forfeiture had been waived and thereafter time was not essential but its efflux was a material fact bearing upon the right of Boone to enforce performance by suit."

²This case was an appeal from a motion vacating a summary judgment on the grounds of fraud. The facts were as follows: Vendor sold an orange grove to vendee for \$22,340.00. Vendee paid \$5,340.00 cash and agreed to pay the balance in ten annual installments. As additional security for the payment of the installments, vendee assigned to the vendor one-half of the proceeds of the 1940 orange crop, such proceeds to be applied on the last installment or installments of principal due under said agreement. The contract was made in February, 1940, and two months later, in April, 1940, vendor notified vendee it exercised its option to declare the entire amount due and, in event of failure to pay the entire amount on or before April 22, 1940, the vendor would declare a forfeiture, etc. In June, 1940, vendor brought action against the holder of the proceeds of the 1940 orange crop and made a motion for a summary judgment for the amount, averring that the sales contract had not been terminated. The Court granted judgment to vendor for one-half the proceeds of the 1940 crop, which amounted to \$2,120.20. But before the judgment was entered, vendor served a notice of forfeiture on the vendee, forfeiting all amount that vendee had paid in under the contract. Upon receipt of vendor's notice, vendee filed a motion to set aside the original judgment granting vendor one-half the proceeds of the 1940 crop, on the grounds of fraud. The motion was granted and the vendor appealed. The Court affirmed the lower court and set aside the summary judgment. The facts of the case are different in every particular from the instant case, and all the Court held was that, in that particular case, the vendor could not forfeit the amount of money paid in by the vendee and also obtain judgment for the money in the hands of a stakeholder which was to be applied on the last installment of the contract. The ground for setting aside judgment was fraud on the part of the vendor.

Neither does his pointing out to the Court that the appellant, in her brief, inadvertently set out the date of the close of the escrow as May 1, 1946, rather than May 6, 1946. In either event, it was at least seventy-two days after appellant's demand for immediate payment, that any money was to be paid to her.

The oral and documentary evidence in this record shows conclusively, we believe, that the bankrupt vendee never had any money with which to meet the appellant vendor's demand; that the only money in sight was the money conditionally left by Bruno and Berg with the Angelus Escrow Service Company [Tr. 136], and that money was not available to the vendor until she signed escrow instructions and agreed to five other conditions which were not provided for in the contract, one of which was the waiting seventy-two days before she obtained any money, and even at that time a lesser amount than that to which she was entitled. In two recent cases decided by the California District Court of Appeal, *Wilson v. Security-First National Bank*, 84 A. C. A. 537 (decided March 17, 1948) and *Pitt v. Mallalieu*, 85 A. C. A. 100 (decided April 19, 1948),³ the law applicable to defaulted

³In the case of *Wilson v. Security-First National Bank*, vendee paid \$2,750.00 down on the purchase of an apartment house for \$40,000.00, but failed to make the additional payments as agreed. Vendee brings action to recover the amount paid. The Court held that a purchaser who has made an unexcused default under a contract for the sale of real property cannot maintain an action to recover money paid under the contract. The Court also construed the meaning of the word "wilful" as used in Section 3275 C. C., which provides for relief against forfeiture "except in case of grossly negligent, wilful, or fraudulent breach of duty," holding that the word "wilful," as used in that section, was synonymous with "voluntary, spontaneous, intentional," and as the breach in this case was intentional, it was "wilful" and no relief could be granted under 3275 C. C. The Court also, in referring to the

real estate contracts was exhaustively reviewed. In the *Pitt v. Mallalieu* case, in discussing the vendor's refusal to sign escrow instructions, the Court said:

“Since the escrow instructions prepared by the plaintiff did not supplant the agreement (*Keeland v. Belmont Company*, 73 Cal. App. (2d) 6; 165 Pac. 930) defendant's refusal to sign them was no excuse for plaintiff's failure to proceed with his performance of an obligation as to which time was the essence. The requirements for his deposit of the balance within ninety days was not conditioned upon either defendant's signing escrow instructions at a definite time, upon the form of deed she would use, or upon her failure to consent to a modification of the agreement.”

Here again, as in all important points raised by this litigation, appellee relies on waiver by appellant to bottom his rights. He now contends that, by reason of the fact that appellant did not object to the mode of offer of appellee, under the provisions of Section 1501 of the Civil Code, she therefore waived her rights to maintain her position that no tender or offer of performance was ever made to her. This waiver was not pleaded or proved, and is, of course, a tacit admission that vendee never made a proper offer of performance.

case of *Glock v. Howard and Wilson*, 123 Cal. 1, said, “So far as the law set forth in this decision is concerned, its repeated affirmation in a long, uninterrupted series of cases has caused it to become settled doctrine under the rule of *stare decisis*.” In the *Pitt v. Mallalieu* case, the Court upholds the proposition, “In a contract for the sale of realty in which time is of the essence, failure of the purchaser to make payment within the time specified constitutes a breach, and no affirmative act by vendor is required to terminate the purchaser's right of enforcement.” The Court in this case also held that waiver to be relied on must be pleaded and that to constitute waiver the holder of the right must intentionally relinquish such right after knowledge of the facts.

We want at this time to make serious objection to the statement of the appellee, appearing at line 13, page 29 of his brief, where he states, "The objections which appellant now makes to the tender are made for the first time on this appeal." The facts as disclosed by the record, and of which appellee is aware, are as follows:

Trustee, in his petition, alleged, "The said Charles E. Hill did tender to the said Jennie Wuchner the full sum then owing * * *" [Tr. 16, line 7] and appellant, in her answer, replied, "Said Jennie Wuchner denies that said contract was in full force and effect on the 11th day of February, 1946, and that Charles E. Hill tendered to said Jennie Wuchner the amount of \$4,912.63, and denies Jennie Wuchner refused to accept such amount." [Tr. 22, line 20.] The record shows conclusively that the Referee did not base his Findings of Fact or Conclusions of Law upon any waiver by appellant as to the mode of offer or tender but squarely on the proposition that the appellee offered to pay all sums due appellant "at a time when the offer could be performed in accordance with the terms and conditions thereof." [Finding of Fact 4, Tr. 39; Conclusions of Law 4, Tr. 43.] Before the Findings were filed, and while they were still proposed, appellant filed written objections to said proposed Findings and Conclusions and specifically to the Findings of Fact and Conclusions of Law as to an offer of performance or tender. The objection as to Finding of Fact 4 was as follows: "That there was \$4,912.63 for Jennie Wuchner there was not true; that there was no money on deposit for her in this escrow. * * * The evidence disclosed, and the Findings should show, that at the time of the alleged offer to perform, the buyers were not ready nor able nor willing to perform the terms of the contract

but on the contrary showed, by their own testimony, there was no money on deposit for the sellers anywhere and showed an absolute inability on the part of the buyers to carry out the terms and conditions of the contract"; [Tr. 30, commencing line 16], and her objection to Conclusion of Law 4 was as follows: "It was not in accordance with the terms and conditions of said agreement of sale and the evidence disclosed that it could not meet the demand of the sellers. Unequivocally, the testimony showed that the buyer did not have the money and that there was no money of any kind available in the escrow or elsewhere, and that the buyers did not have the ability, nor were they able or willing, to comply with the terms of the contract but, on the contrary, the evidence strongly showed a contrary situation." [Tr. 32, commencing line 20.]

The appellant at all times has maintained that there never was any legal tender or offer of performance made by appellee under the provisions of the Civil Code of California. By his argument, appellee admits this, but seeks to avoid it by setting up waiver by appellant. This waiver, so desperately relied upon by appellee, was not pleaded. Not one scintilla of evidence was introduced to the effect that appellant did or did not object to the mode of offer of performance. Neither the Referee nor the Judge mentioned it in their Findings or Conclusions. There is absolutely nothing in this record upon which a Court could pass on the question, one way or another, and it should be disregarded. We believe the following quotation from the recent case of *Pitt v. Mallalieu*, *supra*, at page 107, is pertinent:

"Despite the absence of such allegations, plaintiff argues now that, after he had failed to make the deposit, defendant could have either declared a for-

feiture or treated the agreement as in force. There were many things that defendant could have done but they are irrelevant here as proof of her waiver of plaintiff's compliance with the agreement. The backbone of this controversy is plaintiff's behavior toward his written obligation to deposit \$9,250.00. In lieu of performance, he now regales the Court with his argument that defendant's non action is the equivalent of his actual compliance."

We believe the case of *Allen v. Chatfield*, 172 Cal. 60, disposes of appellee's contention that appellant, by not objecting to the mode of offer of performance, at the time the offer was made, precludes her from objecting later. The Court held in referring to Section 1501 of the Civil Code and Section 2076, Code of Civil Procedure, that an offer of performance without ability to perform, does not put the other party in default, and the party to whom performance is offered is not required to accept it or to point out the inability to perform. The Court said: "The offer showed on its face the inability to perform according to the agreement and Allen was not required to accept it or point out the confessed inability." Of course in this case appellee did not even plead this point and it can not now be considered.

After a careful reading of the remaining points raised by appellee and the cases cited by him to support such points, we do not believe they in any way pertain to the facts in the instant case. As pointed out in our opening brief, appellant never refused to accept an offer of performance by the vendee for the simple reason that she never had the opportunity to do so because no offer was ever made to her. The actions of the bankrupt vendee in attempting to make an offer on February 11, belies the

belated claim of his trustee that he was prevented from making one by actions of the appellant on February 8, 1946. None of these matters were pleaded or proved, and should not now be considered. The sole question before this Court is: Did the Trustee prove, by a preponderance of the evidence, that the appellee made a legal and valid tender to appellant in accordance with the terms of the contract and the provisions of Sections 1485 to 1500, inclusive, of the Civil Code, and did the Trustee demonstrate, by his pleading and proof, that the actions of his bankrupt were such as to invoke the equitable powers of a Court of equity to decree specific performance of a contract. The evidence clearly shows the inability of the bankrupt vendee to make payment, and therefore he could not make a proper tender. The evidence conclusively shows that the only money produced was furnished by two strangers, who attached conditions to its use which the appellant did not have to perform. The record further shows that the Trustee admitted in open court that the bankrupt estate did not have any money except that which could be realized from the sale of the property. The following discussion on this point took place between the Referee and the attorney for Trustee:

“The Referee: Mr. Gendel, has there been any tender made?

Mr. Gendel: For the Trustee?

The Referee: Yes.

Mr. Gendel: No, except in the pleadings. The tender of the amount of any—

The Referee (interrupting): Is that sufficient? Has the Trustee got the money?

Mr. Gendel: The only place the Trustee will get it is from the sale of the property.” [Tr. 87.]

Jurisdiction.

We do not believe any further extended discussion under this heading is necessary. We would like to point out, however, that *In re Logan*, 196 Fed. 678, cited in our opening brief, does sustain and uphold the exact point for which it was cited, *viz.*:

“Of course, mere possession is not enough. The findings must be and the facts must warrant the finding that the bankrupt was the true owner, and that he held as owner.”

We believe that *Federal Farm Mortgage Corp. v. Davis*, 132 F. (2d) 663, and *Starr King School v. Kine*, 146 F. (2d) 8, are particularly in point. These two cases hold that even in petitions filed under Section 75 of the Bankruptcy Act, providing for the relief of farm debtors, the fact that they are farmers and are holding possession of the land under a real estate contract is not enough. It also must appear that petitioners were owners of the property and its possession by them was rightful. We believe it to be elemental that whenever any rights are conferred by reason of possession, the law means and assumes lawful possession and not the possession of a trespasser, which is the most the Trustee can claim in this case. We reassert our claim that, as this was a controversy between the Trustee and a stranger to the proceedings, and that as the bankrupt did not have legal or equitable ownership, or legal possession of the real estate, and because a summary proceeding was not necessary, the petition of the Trustee should be dismissed and the property here involved be stricken from the record. The comment of counsel for appellee, at page 10 of his brief, to the effect that appellant consented to the jurisdiction of the Bank-

ruptcy Court by reason of remarks of her counsel in refusing to stipulate that the Bankruptcy Court had jurisdiction. is without merit, as the entire record discloses. Counsel for Trustee seems to have a penchant for claiming rights based on alleged waivers and estoppels.

Attorney's Fees.

This being an equitable action, and as the contract provided for the payment of attorney fees by the vendee in event suit was instituted, we believe it is clearly within the Court's power to decree attorney fees for appellant's counsel. The equities merit such award.

Conclusion.

We do not believe appellee's brief in any way sustains the Findings of Fact and Conclusions of Law of the Referee and District Judge. The record shows conclusively that bankrupt was in default and that he failed to make payment, as it was his duty to do, and that his action on February 11, 1946, did not amount to an offer of performance or tender, and that on the day this petition was filed the said bankrupt did not have any ownership in or lawful possession of the real estate involved herein. and therefore Trustee's petition should be dismissed and costs and attorney fees be allowed as prayed for in appellant's opening brief.

Respectfully submitted,

WILLIAM W. BEARMAN,

RAYMOND B. McCONLOGUE,

Attorneys for Appellant.

No. 11878.

IN THE
United States Court of Appeals
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TOOLS,

Appellee.

PETITION FOR REHEARING.

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J. P. O'BRIEN,

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Appellee.

PETITION FOR REHEARING.

*To the Honorable Judges of the United States Court of
Appeals, for the Ninth Circuit:*

Your petitioner, George T. Goggin (hereinafter referred to as "trustee"), as trustee in bankruptcy of the estate of Charles E. Hill, doing business as Hill Machine Tools, and appellee herein, respectfully petitions the above entitled Court for a rehearing in the above entitled case, the judgment of this Court having been entered herein on February 4, 1949, with a written opinion by Judge Stephens, after a hearing before Judge Mathews, Judge Stephens, and District Judge Driver. The grounds upon which this petition for rehearing is based are:

A. The opinion of the Court contains an inaccurate statement of facts.

B. The opinion of the Court contains, and the judgment which the Bankruptcy Court is instructed to enter is based upon, an interpretation of the law of the state of California which is in conflict with the controlling judicial decisions of the courts of that state.

C. The order of this Court enforces a forfeiture against the trustee in bankruptcy, without permitting him to apply to the Bankruptcy Court for relief, contrary to the California statutes and case law and contrary also to the recognized equitable nature of bankruptcy proceedings.

These matters appeared for the first time in the opinion of the Court, and therefore no opportunity was heretofore available for counsel to set forth their views thereon.

I.

The Facts.

In the statement of facts appearing in the opinion of the Court there are certain inaccuracies which we call to the Court's attention for the reason that a reading of the opinion might indicate that the correct facts would, on the theory of the Court stated in its opinion, have produced a different result. Neither party to the appeal pointed out the correct facts (which are hereinafter mentioned) in their briefs or in the oral argument, for the reason, presumably, that these facts were felt by both sides to have been conceded.

(a) Throughout the opinion it is intimated that Henry F. Poyet, president of the Angelus Escrow Service Corporation, was an apparent stranger to the transaction between the parties. In this connection we respectfully direct the Court's attention to the following portions of the record which indicate that Mr. Poyet, instead of

being a stranger to the transaction, was the attorney for Mr. and Mrs. Hill (Mr. Hill being the bankrupt herein).

Finding IV of the Referee [Tr. 39], which was adopted by the District Court on review, was to the effect that when the tender was made [Trustee's Exhibit No. 4] it was made by the bankrupt "through his attorney and agent in fact, to-wit, Henry Poyet." [Tr. 39.] Objections to the findings of fact were filed by the appellant before the Referee. No objection was made to the quoted findings. In fact this finding was expressly admitted as being proper by the appellant in her objections to the proposed findings [Tr. 32] when appellant states "there was an admitted offer by the attorney, to-wit, Henry Poyet." [See, also, Tr. 30.]

Moreover, the finding was supported by substantial evidence and, as the record shows, no contradictory evidence was offered. The record discloses that Mr. Poyet was the attorney of record for the bankrupt and for Mrs. Hill throughout this proceeding. [Tr. 9, 74.] Mr. Poyet testified during the trial of the matter to the effect that he was acting as attorney for Mr. Hill during the month of February, 1946. [Tr. 110.] The appellant knew at the time the tender was made that Mr. Poyet was acting as attorney, as is indicated by the reply of the appellant to the letter with which Mr. Poyet sent the escrow instructions, set forth as Trustee's Exhibit No. 4, in which Mr. Poyet is addressed as "Attorney-at-law" [Tr. 115] notwithstanding the fact that the letter enclosing the escrow instructions was signed by Mr. Poyet as president of the Angelus Escrow Service Company. [Tr. 116.]

We feel that the foregoing references to the record demonstrate conclusively that Mr. Poyet at all times herein

was acting as attorney for the bankrupt, the vendee under the installment contract involved.

Upon receipt of Mrs. Wuchner's notice to the effect that she exercised her option to declare the entire balance of principal and interest due under the contract Mr. Poyet's letter enclosing the escrow instructions was sent to Mrs. Wuchner informing Mrs. Wuchner that there was on deposit the full amount of her demand. Mr. Poyet's letter was dated February 11, 1946 and was in reply to the notice dated February 5, 1946. The notice purporting to declare a forfeiture was dated February 8, 1946.

(b) In its opinion the Court referred to the letter of Mr. Poyet dated February 11, 1946, enclosing the escrow instructions in the following manner on page 12 of its slipsheet opinion: "We hold that the attempted payment of the unpaid contract price was abortive. No other attempt to conform to the contract was ever made." In connection with the second quoted sentence it is notable that on June 28, 1946 the trustee in bankruptcy made a tender to Mrs. Wuchner of the balance of the purchase price with all accrued interest thereon, which fact is recognized by the Court in its slipsheet opinion on page 4 thereof when it is stated "on June 8, 1946, the balance of the purchase price with accrued interest was tendered Mrs. Wuchner by the trustee, and on July 1, she rejected the tender."

(c) At this point it appears advisable, though possibly out of sequence, to discuss the conclusion of this Court that the tender made on behalf of Mr. Hill by Mr. Poyet was an invalid tender by reason of the fact that the conditions therein contained and the conditions in the separate but related escrow between Frank Bruno, Teddy Berg and

Mr. Hill were not contemplated by the contract between Mr. Hill and Mrs. Wuchner and that therefore the subsequent declaration of forfeiture of Mrs. Wuchner had the effect of foreclosing all of the vendee's right under the contract. In this respect the Court indicates that the escrow instructions by the terms of which Mrs. Wuchner would be required to deposit a deed and a policy of title insurance before she received the money due her was a requirement beyond the terms of the contract. Petitioner respectfully submits that this view is not in accord with the contract of the parties providing that "the said seller on receiving full payment, at the time and in the manner above mentioned, agrees to deliver to the said buyer his policy of title insurance, showing the title to said property to be vested in the seller, free of encumbrance except as above stated and to execute and deliver to the said buyer, or assigns, a good and sufficient deed of grant, bargain and sale." [Tr. 98.] This provision of the contract would seem to demonstrate that the parties expressly contracted that the seller should give the buyer, upon payment of the price, a policy of title insurance and a deed. The California cases to be discussed below demonstrate that these become concurrent conditions when the purchase price becomes due either by lapse of time or by exercise of the option contained in the acceleration clause.

The quoted provision of the contract is, we think, an answer to the fact upon which the Court relied most heavily in its opinion that Mr. Hill had assigned his rights under the contract to two apparent strangers, Bruno and Berg. The quoted provision of the contract clearly contemplates that the buyer would have the right to transfer his interest in the contract in which event the seller would execute a deed to "buyer, or assigns."

(d) Considerable stress is given in the opinion to the various other provisions of the escrow instructions. At this point we desire to call the Court's attention to the discussion in appellee's brief on pages 27 through 31 where it is pointed out that, under the statutory law of the State of California as interpreted and applied by the controlling decisions of the courts of that state, all objections to tender are waived unless the objections are made at the time of tender. (California Civil Code, Section 1501; Code of Civil Procedure, Section 2076.) There is nothing in the record to show that the appellant at any time made any objection to the tender.

II.

The Law.

Certain of the factual points hereinabove discussed necessarily involve questions of law, but petitioner has reserved for this portion of his petition those instances where, it is respectfully submitted, the opinion of this Court departs most fundamentally from established principles of California law.

Although it might be appropriate here to discuss the compelling doctrine of *Erie Railroad Co. v. Tomkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, petitioner feels that this would be unnecessary in the present case for the reasons that this Court is doubtless aware of the import of that case, and, further, that this Court has undertaken from the outset to apply the appropriate state law. Petitioner respectfully submits, however, that *Erie Railroad Co. v. Tomkins* is of extreme importance here since the opinion in this Court in the instant matter is in funda-

mental conflict with the settled California law in the following three respects:

- A. It fails to recognize the election of remedies doctrine, the application of which would produce a holding that the appellant made a binding election by demanding the balance of the purchase price.
- B. The notice of declaration of forfeiture was wholly ineffective by reason of appellant's failure to make a tender of a deed in connection therewith.
- C. The Court failed to apply Section 3275 of the Civil Code of the State of California, which would require granting the vendee relief from the attempted forfeiture.

A. ELECTION OF REMEDIES. Inasmuch as this point was raised in appellee's brief it would not be proper for us in this petition to do more than to call the court's attention to the discussion appearing upon pages 23 to 25 of appellee's brief and the cases there cited. There it was pointed out that both by operation of law and by express provision of the contract involved in the instant case the appellant had the right either to declare a forfeiture or to demand the entire balance of the purchase price; she could not do both. This point is not discussed in the Court's opinion.

B. TENDER OF DEED. In footnote five of its opinion, this Court distinguishes the cases of *Boone v. Templeman*, 158 Cal. 290 and *Hayt v. Bentel*, 164 Cal. 680, which require the vendor to make a tender of a deed in order to effectively declare a forfeiture under a land installment contract where time is made of the essence, on the ground

that both of these cases involve situations where the vendor waited until the entire purchase price had become due by lapse of time under the contract. The distinction is stated as follows:

“In the instant case the appellant acted under the terms of the contract and took advantage of her option. This distinguishes our case. The vendor did not allow the whole to become due by a mere lapse of time but acted within the terms of the contract, the consequences not being determined by law but by contract.”¹

Inasmuch as no such distinction was mentioned either in the briefs of the parties herein or during oral argument of counsel this petition is our first opportunity to point out that no such distinction is recognized under the law of the State of California.

¹In the instant case it would seem that at the time of the attempted declaration of forfeiture all the installment payments had become due under the contract by lapse of time. \$1500.00 was to have been paid before the vendee was entitled to a deed. \$349.38 was paid upon execution of the contract and \$200.00 was to have been paid each month thereafter commencing with the month of July, 1945. As stated on page 2 of the slipsheet opinion, “The first two monthly installments were paid. After four months had elapsed without further payment Mrs. Wuchner . . .” declared the entire purchase price due and later declared the contract forfeited and cancelled. Thus \$749.38 had been paid in compliance with the contract, and the four months’ default of \$200.00 each would have totalled \$800.00, which added to the sums already paid would equal \$1549.38—a sum in excess of that called for by the installment provisions of the contract.

In view of these facts it appears that even under the Court’s interpretation of the California law as announced in footnote five of its opinion in the instant case the vendor would have had to tender a deed because all installments had become due under the contract by lapse of time. As pointed out in the text hereof, we place no particular reliance on this point because the California law recognizes no distinction such as that stated in footnote five to the Court’s opinion.

The case of *Caspar Lumber Co. v. Stowell* (1940), 37 Cal. App. 2d 58, constitutes a specific holding that whether the entire balance of purchase price under an installment land contract (where time is of the essence) becomes due *either by lapse of time or pursuant to the vendor's option in the event of a default to declare the entire balance due*, the vendor must tender a deed in order to validly declare a forfeiture. In that case the contract was very similar to the one involved in the instant case. The plaintiff there was the vendor who sought to recover the balance of the purchase price due under the contract. The trial court sustained the defendant's (vendee's), demurrer to plaintiff's complaint and in affirming the sustaining of the demurrer the District Court of Appeal specifically ruled on the question of whether or not a tender was necessary where the vendor exercised his option to declare the entire balance of principal and interest due as he had a right to do under the contract in the event of a default, notwithstanding the fact that the contract had not as yet matured. In holding that the vendor must make a tender of a deed in connection with the demand pursuant to the acceleration clause the court refers to the case of *Boone v. Templeman*, *supra*, and quotes the language from the opinion quoted by the court in footnote five of its opinion to the instant case. Following that, the opinion states (37 Cal. App. 2d at 62):

“Appellant seeks to confine the application of the rule to those cases in which ‘the vendor waits until the maturity of the contract before filing suit’. Appellant cites and relies upon *Christian v. Johnson Const. Co.*, 161 Md. 87 (155 Atl. 181), as the only authority upon which the argument is founded that, when a vendor claims a default of the whole purchase

price under an acceleration clause, his suit to recover the balance due is not a suit to recover the instalments due, but an action for the breach, and that no tender is necessary. *The case stands alone and does not represent the California rule.* [Italics ours.]

“In case of breach by the vendee, the vendor may bring suit (1) for the instalments which are due; (2) for damages for the breach; (3) for specific performance; (4) to foreclose; or (5) to quiet title. The first two actions are at law, the last three in equity. A general offer to do equity, or a plea of readiness and willingness will excuse a plea of tender in a bill of equity. (26 R. C. L., p. 626.) This is on the principle that a court of equity once acquiring jurisdiction of the cause will assume full jurisdiction in order to do complete equity. But there is no such rule in respect to a pure action at law such as we have here. In such a case, where the obligation of the vendor is to convey upon payment of the full purchase price, the two conditions are dependent and concurrent. No other rule is possible. Paragraph IV of the contract of sale gives the vendor the option in case of any default of vendee, to claim the entire balance due, or to claim the rights of the vendee forfeited. The complaint pleads that the vendor elected to claim the entire purchase price, and the written notice to the vendee pleaded as an exhibit is to that effect. No forfeiture was attempted and none pleaded. The rights of the parties are plain—if the vendor recovers the full purchase price, the vendee is entitled to a conveyance of the property. We are not impressed with appellant’s suggestion that respondent might not satisfy the judgment, and hence no tender would be necessary, or that respondent might sue to quiet title or sue in equity to compel appellant to execute a deed. The principle of the ruling cases is that where under

a contract for the sale of real property calling for the payment of the purchase price in instalments, with an acceleration clause in event of nonpayment of any instalment, the vendor exercises the acceleration option and declares the whole amount due, the parties are in the same position as when the final payments become due by the lapse of time fixed in the contract. As above noted, the appellant herein did not claim a default or forfeiture, but demanded payment in full. Such a demand cannot put the vendee in default without a tender of a deed. (*Lemle v. Barry*, 181 Cal. 6, 10 [183 Pac. 148].)"

The rule stated by the California Supreme Court in *Boone v. Templeman*, to the effect that when all the payments are due a vendor *must* tender a deed as a condition to either an action for the price or a declaration of forfeiture, is unequivocal. The holding in the *Caspar Lumber Co.* case to the effect that the foregoing rule is equally applicable to contracts where the entire amount is due either by reason of lapse of time or by acceleration, is similarly unequivocal. In view of these cases, petitioner respectfully submits that under California law Mrs. Wuchner cannot be held to have placed the vendee in default.

C. RELIEF FROM FORFEITURE. Courts of Bankruptcy are inherently courts of equity. As illustrative of this fact the Supreme Court of the United States made the following statement in *Pepper v. Litton*, 308 U. S. 295, 41 A. B. R. (N. S.) 279, at page 288:

"Courts of bankruptcy are constituted by sections 1 and 2 of the Bankruptcy Act (30 Stat. 544) and by the latter section are invested 'with such jurisdiction at law and in equity as will enable them to exercise

original jurisdiction in bankruptcy proceedings.' Consequently this court has held that for many purposes 'courts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity.' "

See, also:

Sec. & Exch. Comm. v. U. S. Realty & Imp. Co.,
310 U. S. 434, 455-457, 42 A. B. R. (N. S.)
602, 617-619.

It is a fundamental maxim that "equity abhors forfeitures" and this is particularly true in any case in bankruptcy where the contemplated forfeiture would prejudice the rights of innocent creditors.

In bringing the foregoing basic principles to bear on the instant case, we find that this Court has enforced a forfeiture to the detriment of the trustee in bankruptcy who sought, for the benefit of the creditors of the bankrupt, to assert the rights of a vendee under a land installment contract. In addition, the order of this Court completely forecloses the right of the trustee, granted both by the California cases and statutory enactment, to apply to the bankruptcy court for relief from the forfeiture. It should be noted, preliminarily, that both the referee and the District Court ruled in favor of the trustee. Thus, they were convinced that no forfeiture should be allowed and that the trustee should be permitted to complete the contract. But even if the vendor were to be permitted to declare a forfeiture, is it not conclusively settled under California law that the trustee, vested with the rights of the vendee for the benefit of all his creditors, is equally to be permitted to apply to the trial court for relief from that forfeiture?

In a footnote to appellee's brief, on page 23 thereof, reference is made to a line of cases in the state of California allowing vendees under installment land contracts (where time is of the essence) relief from forfeiture pursuant to the provisions of Section 3275 of the Civil Code of the State of California. At that time we pointed out that that line of cases seemingly ignored the principle of the case of *Glock v. Howard & Wilson Colony Co.* (123 Cal. 1). It is notable, however, that the last case there cited, *Ebbert v. Mercantile Trust Co.* (1931), 213 Cal. 496, at pp. 500-501, made mention of *Glock v. Howard* but found it to be not controlling on the ground, *inter alia*, that Civil Code Section 3275 was not considered therein. We do not propose to re-argue that line of cases in this petition for rehearing but we take this opportunity to invite this Court's attention to two recent decisions of the California courts applying Section 3275 of the Civil Code and casting considerable doubt on the present validity of the rule of *Glock v. Howard & Wilson Colony Co.*, *supra*. We feel that this is proper at this time in view of the fact that the two cases we shall mention herein were decided subsequent to the writing of the briefs and the oral argument in this case. These cases are particularly significant by reason of this Court's reliance on the case of *Troughton v. Eakle*, 58 Cal. App. 161 in its opinion. (Footnote 4 thereof, and the text in connection therewith.) In *Troughton v. Eakle*, the court, after stating the material quoted by this Court in footnote 4 of its opinion points out for the guidance of the trial court to which the case

was remanded the possible application of Section 3275 of the Civil Code in the following language (58 Cal. App. at 173):

“At any rate, the courts are ready upon the slightest equitable consideration to relieve parties, upon such terms as may be just, from the results of a forfeiture. The principle is embodied in section 3275 of the Civil Code as follows: ‘Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions he may be relieved therefrom, upon making a full compensation to the other party, except in case of a grossly negligent, wilful, or fraudulent breach of duty.’

“We see no reason why such relief might not be had in the present case as it does not fall within the exception. The plaintiffs made an effort to comply with their obligation, but, acting probably without legal advice, their effort was ineffective. Their complaint was framed, as we have seen, upon a different theory and it would be necessary to have it amended to justify the relief that we have suggested. We perceive no valid objection to such procedure and if that course be taken, the court can allow whatever is just and equitable in view of all the circumstances. (*McDonald v. Kingsbury*, 16 Cal. App. 244 [116 Pac. 380].)

“We think the judgment should be reversed, and it is so ordered.”

The case of *Gonzalez v. Hirose* (decided December 23, 1948), 33 A. C. 185, is an example of the Supreme Court of the State of California applying section 3275 of the Civil Code to give a defaulting vendee on an instalment land contract where time was of the essence relief from

forfeiture when the court reversed a judgment of the trial court quieting the title of the vendor's assignee to the real property there involved. The court relieved the vendee from the attempted forfeiture notwithstanding the fact that section 3275 of the Civil Code *was invoked for the first time on appeal*. The theory of granting relief to the vendee in this situation is stated as follows (33 A. C. at page 188):

“In the agreement it was provided that time was of the essence, that default in payment would give the bank the option to declare a forfeiture of the defendant's rights and all interest in the land, and that a waiver of one restriction and condition should not be construed as a waiver of any succeeding breach or other provision of the agreement. Unquestionably the defendant defaulted. However, subsequent to the defaults the record shows a course of conduct by the bank which, during the years 1943 and 1944, credited payments on account of interest and principal without regard to the time factors. Although the parties had covenanted that a waiver of one breach would not waive a subsequent breach or other condition, it is clear that the bank had waived the time provision. Nevertheless the plaintiff, immediately upon becoming assignee of the bank's rights, gave notice that the defendant's rights were forfeited. Since the law looks unfavorably upon forfeitures, waiver of the time clause will be deemed to be a waiver of the forfeiture unless the time element is first reestablished by definite notice. (*Boone v. Templeman*, 158 Cal. 290 [110 P. 947, 139 Am. St. Rep. 126]; *City of Los Angeles v. Krutz*, 170 Cal. 344 [149 P. 580]; *McCartney v. Campbell*, 216 Cal. 715, 720 [16 P. 2d 729]; Rest., Contracts, §311.) Admittedly no such notice was given.

“The test as to when a party will be relieved from a forfeiture is stated by Pomeroy, Equity Jurisprudence (5th ed.), section 433, as follows: ‘Wherever a penalty or a forfeiture is used merely to secure the payment of a debt, or the performance of some act, or the enjoyment of some right or benefit, equity, considering the payment, or performance, or enjoyment to be the real thing intended by the agreement, and the penalty or forfeiture to be only an accessory, will relieve against such penalty or forfeiture by awarding compensation instead. . . . The test which determines whether equity will or will not interfere in such cases is the fact whether compensation can or cannot be adequately made for a breach of the obligation which is thus secured.’

“The case before us plainly indicates that the purpose of the time and forfeiture clauses was merely to secure payment of the purchase price, that payment thereof would make the bank or its assignee whole; that since the time and the forfeiture clauses had been waived the defendant was entitled to a definite seasonable notice from the plaintiff of the reestablishment of those conditions with reasonable opportunity for compliance before the plaintiff could declare a forfeiture. Instead of affording the required notice the plaintiff, with knowledge of the circumstances gained by his business relationship with the defendants, sought to obtain an advantage and acquire the property for a figure far below its value and freed from the claims of the defendants. In the absence of the appropriate notice to comply with reestablished time conditions or of an offer by the plaintiff of a deed upon payment of the balance due, there was no breach of duty on the part of the defendant. Equitable principles apply in a quiet title action. (*O'Brien v. O'Brien*, 197 Cal. 577 [241 P. 861]), and the courts may grant relief against a for-

feiture in the absence of a breach of duty (Civ. Code, §3275; *Ebbert v. Mercantile Trust Co.*, 213 Cal. 496, 499 [2 P. 2d 776]; *McCormick v. Rossi*, 70 Cal. 474 [15 P. 35]; *Keller v. Lewis*, 53 Cal. 113).

“It is apparent, under the circumstances of this case, that the result would be unconscionable if the defendant be not afforded the relief requested. The unqualified judgment is therefore unsupported. The plaintiff is entitled only to a qualified judgment containing a provision that a deed be executed and delivered conveying title to the property to the defendant upon payment to the plaintiff of the amount due him, within such time as the trial court may deem to be reasonable.

“The judgment is reversed and the cause remanded for further proceedings consistent with this opinion.”

All the justices of the California Supreme Court concurred in the opinion.

Finally in this connection we refer to a recent opinion of Justice Peters of the First District of the District Court of Appeal of the State of California in the case of *Barkis v. Scott* (decided January 18, 1949), 89 A. C. A. 778. Justice Peters reviewed the law of the State of California subsequent to *Glock v. Howard* and concludes that *Glock v. Howard* is of very doubtful authority today particularly in view of the fact that it overlooked section 3275 of the Civil Code and therefore cannot be interpreted as holding that the section is inapplicable (89 A. C. A. 784). We cannot single out any portion of the opinion of Justice Peters for quotation herein. We feel that the entire opinion constitutes a statement of the California law on the question and we respectfully request that it be considered in connection with this petition for rehearing. The District Court of Appeal on February 17, 1949,

denied a petition for rehearing on the case of *Barkis v. Scott*. We are unable to ascertain at this time whether or not a hearing has been requested in the California Supreme Court. All we desire to point out herein, in connection with the *Barkis* case, is that judgment of the trial court was there reversed which judgment forfeited the vendee's rights upon the basis of a finding that the vendee's "failure to meet said obligation . . . was grossly negligent and a wilful breach of duty."

The California Appellate Courts, in the *Gonzales* and *Barkis* cases, *supra*, compelled relief from forfeiture under California Civil Code, Section 3275; in other cases, such as *Troughton v. Eakle*, *supra*, the Appellate Court remanded the case for the trial court's decision as to the application of that section, but strongly implied that such relief should be granted. In the instant case, however, this Court has remanded the matter with directions *entirely foreclosing* the right of the trustee under California law to apply to the Bankruptcy Court for relief under California Civil Code, Section 3275. Thus, a trustee in bankruptcy is precluded from exercising, on behalf of the innocent creditors, the right that any ordinary vendee could exercise in the California courts; indeed, this right (relief from forfeiture under Civil Code, Section 3275) is of such overwhelming significance that the California Supreme Court has compelled its exercise when raised by the vendee for the first time on appeal after an adverse judgment in the trial court. Here the trustee was successful below and thus the reversal with directions appears to be particularly inequitable. The trustee has already tendered payment, and is still ready, willing and able to pay the entire balance of the purchase price with all accrued interest thereon.

Conclusion.

Petitioner is mindful that petitions for rehearing seldom meet with success, presumably for the reason that they are often mere rearguments after this Court has already studied the applicable law and facts and reached its decision. Nevertheless, we respectfully urge that this Court reconsider its opinion herein, perhaps *en banc*, in view of its sharp departures from well-settled California law and its grave inroads upon the equitable jurisdiction of the Bankruptcy Court. The instant opinion will serve as a block to all vendees who seek relief from forfeiture of installment land contracts; petitioner, however, is most concerned with the holding (without discussion) that a trustee is not entitled in the Federal Courts to the equitable relief afforded to any vendee in the State Courts by virtue of California Statute. We feel that not only the nature of bankruptcy proceedings, but *Erie Railroad Co. v. Tompkins, supra*, as well, strongly militate against such a result.

Finally, petitioner is concerned lest the opinion herein result in the same problem that for some time faced the California courts after the case of *Glock v. Howard, supra*. As shown above, the *Glock* case failed to mention Civil Code, Section 3275, and it took many years to reinstate the force of that statute which did no more than state a generally accepted equitable rule. Now relief under Civil Code, Section 3275, is assured by strong state court decisions. Should this Honorable Court, governed by state law, rule otherwise?

Wherefore, your petitioner prays that this petition for rehearing be granted in order that the case can be reargued and reconsidered in the light of the correct facts and the applicable law.

Dated: March 4th, 1949.

Respectfully submitted,

GENDEL & CHICHESTER,

By MARTIN GENDEL,

Attorneys for Appellee and Petitioner.

Certificate of Counsel Under Rule 25.

I certify that in my judgment the foregoing petition for a rehearing is well founded and that it is not interposed for delay.

Dated: Los Angeles, California, March 4, 1949.

GENDEL & CHICHESTER,

By MARTIN GENDEL,

Attorneys for Appellee and Petitioner.

No. 11,878

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JENNIE WUCHNER,

Appellant,

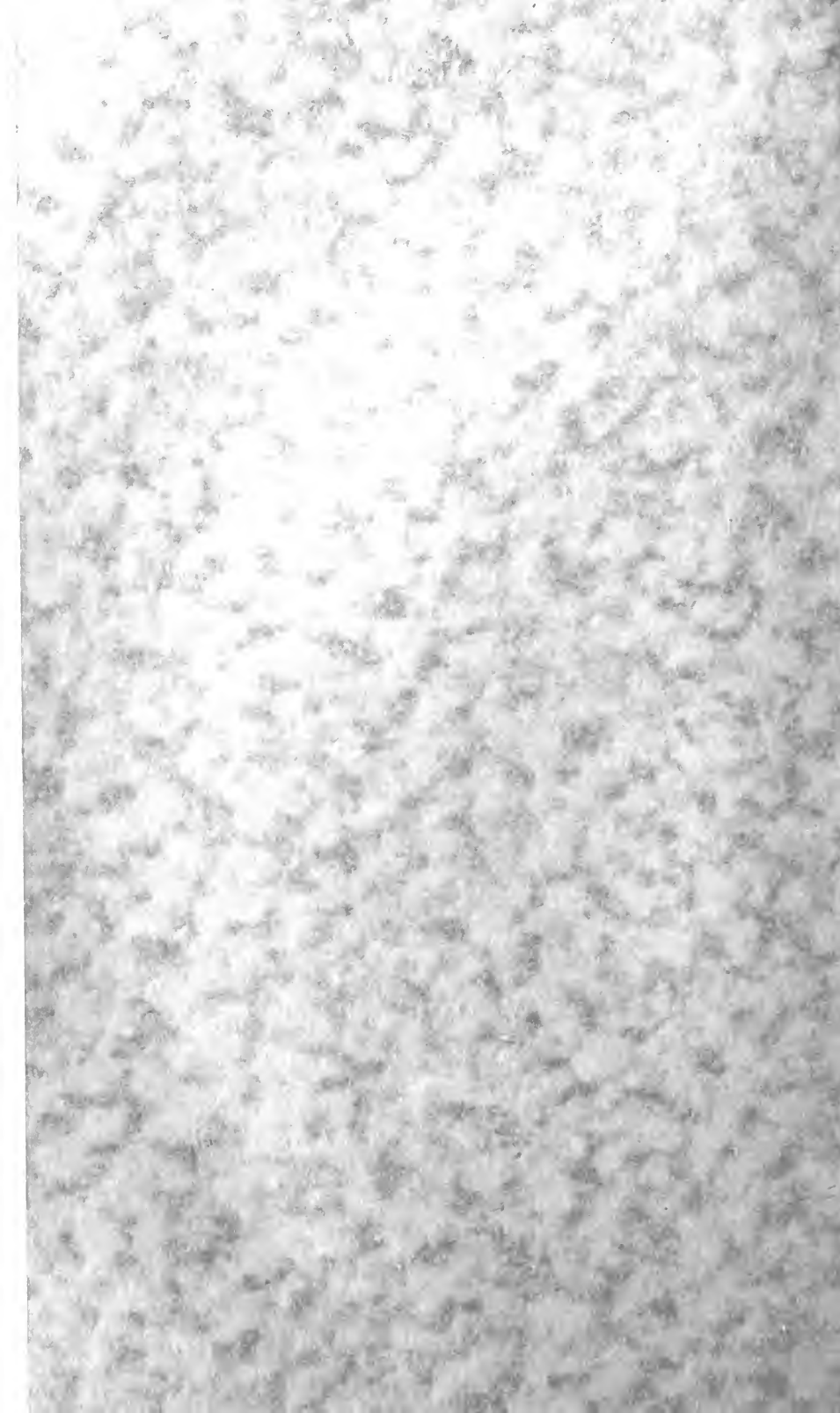
vs.

GEORGE T. GOGGIN, Trustee in Bankruptcy of the Estate
of Charles E. Hill, doing business as Hill Machine
Tools,

Appellee.

Memorandum to Court by Appellant, Decision Not to
Reply to Arguments in Trustee's Petition for
Rehearing.

WILLIAM W. BEARMAN and
RAYMOND B. McCONLOGUE,
306 Taft Building, Los Angeles 28,
Counsel for Appellant.



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IN THE

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FOR THE NINTH CIRCUIT

JENNIE WUCHNER,

Appellant,

vs.

GEORGE T. GOGGIN, Trustee in Bankruptcy of the Estate
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Appellee.

**Memorandum to Court by Appellant, Decision Not to
Reply to Arguments in Trustee's Petition for
Rehearing.**

*To Honorable Judges Mathews and Stephens, Circuit
Judges, and Driver, District Judge:*

The Appellant in the above entitled matter, who was given permission by the Court to answer Appellee's Petition for Rehearing, filed through Attorneys Gendel and Chichester, fifteen (15) days from April 15, 1949, and to reply to the arguments opposing the Judgment previously rendered, which are in the Trustee's Petition for Rehearing; upon application to the Court by Appellant, time for reply was extended to the 4th day of May, 1949, hereby submits to your Honorable Court this notification by the Appellant, through her attorneys, as follows: After again going through the records in this case, the transcript and

the briefs filed, the opinion of Judge Stephens, and the Petition for Rehearing of Appellee, that the Appellant submits that the opinion written by Judge Stephens overruling the Referee in Bankruptcy, in this given case, the United States District Court, through the Honorable Jacob H. Weinberger, District Judge, was warranted by the true facts in this case; that the equities of this case were and are preponderingly in favor of the Appellant. That the Court had all of the cases before it when the original opinion was rendered; and the last cases cited by the Appellee in his Petition for Rehearing do not, in our opinion, in view of the facts in this particular case, and the equities herein, the exposition of the law, as made by Judge Stephens in his opinion, affect Appellant's right to have the Judgment of the United States Court of Appeals heretofore rendered in this matter reaffirmed in favor of Appellant.

We do not believe, under any theory of this case, that the conclusions drawn by the Trustee, as it appears on pages 19 and 20 of his Petition for Rehearing, are in anywise justified, sound, and/or warranted.

For all of these reasons, after extended consideration, we submit that the judgment of reversal in favor of Appellant should still stand, based upon the law, the facts and the equities in this instant case; that the Court was, and is, conversant with all of these cases that have been cited heretofore by respective counsel for both Appellant and Appellee; the new cases cited by Appellee in his Petition for Rehearing, that at this time the Appellant,

through her attorneys, does not feel that the Court needs any further assistance from the Appellant in order for said Court to be enabled to render a reaffirmation of the judgment in favor of the Appellant.

Just in a general way, we make the observation that prolonged prosecution of Trustees in Bankruptcy in cases involving private litigants, whose resources are limited, does in many cases mean a depletion of a bankrupt's estate.

Respectfully submitted,

WILLIAM W. BEARMAN and
RAYMOND B. McCONLOGUE,

By WILLIAM W. BEARMAN,
Of Counsel for Appellant.

No. 11879

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MARION JONCICH, JOE C. MARDESICH and
ANTOINETTE BOGDANOVICH,

Appellants,

vs.

ANDREW XITCO, JR.,

Appellee.

APOSTLES ON APPEAL

Upon Appeal From the District Court of the United States
for the Southern District of California
Central Division

FILED

MAY 27 1940

PAUL R. O'BRIEN,
CLERK

No. 11879

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

MARION JONCICH, JOE C. MARDESICH and
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Upon Appeal From the District Court of the United States
for the Southern District of California
Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF PROCTORS:

For Appellant:

McCUTCHEN, THOMAS, MATTHEW,
GRIFFITHS & GREENE

HAROLD A. BLACK

PHILIP K. VERLEGER

704 Roosevelt Building

Los Angeles 14, Calif.

For Appellee:

HERBERT R. LANDE

413 West Seventh Street

San Pedro, Calif. [1*]

In the United States District Court
Southern District of California
Central Division

In Admiralty No. 6897-M

ANDREW XITCO, JR.,

Libelant,

vs.

OIL SCREW "PIONEER," Her Tackle, Apparel, and
Equipment,

Respondent.

CITATION

To Andrew Xitco, Jr., Libelant, and His Attorney Herbert
Lande:

Whereas, claimants, Marion Joncich, Joe C. Mardesich, and Antoinette Bogdanovich, have lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from the final decree lately rendered in the District Court of the United States, Southern District, Central Division, in the above entitled cause;

You Are Therefore hereby cited to appear before the said United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, State of California, on the 21st day of February, 1948, to show cause, if any there be, why the said decree entered against the said appellants should not [2] be corrected and why justice should not be done to the parties in that behalf.

Given Under My Hand in the City of Los Angeles, in the State of California, on the 14th day of January, 1948.

LEON R. YANKWICH

United States District Judge [3]

Service of the within and receipt of a copy is hereby admitted this 15 day of January, 1948. Herbert R. Lande, per G. Padfield.

[Endorsed]: Filed Jan. 16, 1948. Edmund L. Smith, Clerk. [4]

[Title of District Court and Cause]

LIBEL IN REM FOR SALVAGE

To the District Court of the United States, for the Southern District of California, Central Division:

The libel of Andrew Xitco, Jr., master of the oil screw vessel called "North Queen", for himself and all others entitled, against the oil screw "Pioneer", her tackle, apparel, and equipment, alleges as follows:

I.

That at all times hereinafter mentioned, libelant was the master of the American oil screw vessel called the "North Queen"; and was and is a resident of the Southern District of California, Central Division.

II.

That the "North Queen" is an oil screw vessel of one hundred fifty tons gross, and length of eighty-two feet; and that her [5] value at the time of the salvage services hereinafter mentioned was \$125,000.00.

III.

That at the times mentioned hereafter, the said vessel "North Queen" was owned by the libelant, 25%, A. K. Anderson, 25%, Arne Strom, 25%, and Haldor Dahl, 25%; that the crew of said vessel consisted of libelant as Master and twelve other crew members.

IV.

That the oil screw "Pioneer", official number 246153, is an American fishing vessel of a type known as a purse seiner; that said vessel is of 183 tons gross, 99 tons net, 86.4 feet in length, and was built in 1944; that the approximate value of said vessel at the time the services herein mentioned were rendered was \$175,000.00.

V.

That on the night of January 9, 1947, the respondent vessel "Pioneer" was sailing in waters off the coast of Southern California, that at or about 7:10 P. M. the said vessel was in waters off Laguna Beach, California; that about said time said vessel was navigating near the shore and ran upon some rocks and became stranded; that said vessel thereupon sent out a call for help on her radio; that the said vessel was then and there in distress and danger, in that she was stranded on rocks so that her own means could not remove her therefrom, and that she was being pounded by breakers and a ground swell.

VI.

That the master of the "North Queen" heard the distress call of the respondent vessel, responded thereto and

immediately went to her aid; that the "North Queen" arrived at the place where the "Pioneer" was stranded at about 7:45 P. M.; that at said time respondent vessel was in distress and danger as alleged [6] aforesaid; that upon the arrival of the "North Queen", the libelant maneuvered her close to the place where the "Pioneer" was stranded, and at that time the master of the "Pioneer" called to the libelant and asked him to take a cable from the "Pioneer" and endeavor to pull that vessel off the rocks; that the libelant agreed to this, and a skiff came from the "Pioneer" carrying a manila line to the "North Queen"; that the manila line was attached to the steel cable from the "Pioneer"; that the "North Queen" took the cable from the skiff and pulled the line and cable aboard the "North Queen", and secured the cable to the main bitts aft; that in order to exert a pull on the cable, it was necessary to raise the cable over the platform and nets on the stern of the "North Queen", and that accordingly a line from the boom of the "North Queen" was used to raise the cable to sufficient height for clearance; that the "North Queen" thereupon began to pull and strain on the cable in an endeavor to free the "Pioneer"; that very shortly the cable parted, but that the line from the boom to the cable was released in time so as to hold the end of the cable and still allowing sufficient play so as not to bring down the rigging of the "North Queen"; that the said cable was again fastened to the bitts of the "North Queen" and the libelant and crew of the "North Queen" again endeavored to free the "Pioneer"; that during the next half hour, by the use of great skill and in-

genuity, the master of the "North Queen" was able to pull the "Pioneer" free of the rocks upon which she was stranded.

VII.

That the respondent vessel "Pioneer" was stranded on the rocks in such a manner that if it had not been for the action of the "North Queen" in freeing her, the "Pioneer" would have been buffeted by the ground swells and breakers, and pounded on the rocks, which would have put her in great danger of having her hull punctured, and could have caused the sinking of the vessel. [7]

VIII.

That the salvage services rendered by the "North Queen" and her crew were salvage services of a high order of merit; that they were furnished promptly, efficiently and skillfully, and under conditions which were rendered difficult and dangerous, and which resulted in the freeing of the "Pioneer".

IX.

That by reason of the premises aforesaid, the owners, masters and crew of the "North Queen" are entitled to a liberal salvage award; that a fair and reasonable salvage award would be the sum of \$17,500.00; that there has not been any payment for said services to the libelant or others.

X.

That all and singular the premises are true, and within the admiralty and maritime jurisdiction of this Court; and the vessel "Pioneer" is now, or during currency of process herein will be, within this District.

Wherefore, libelant prays:

1. That process in due form of law, according to the practice of this Honorable Court in causes of admiralty and maritime jurisdiction, may issue against the said oil screw "Pioneer", her tackle, apparel and equipment;
2. That any and all persons having any interest in said vessel may be cited to appear and answer all and singular the matters aforesaid;
3. That the Court may be pleased to decree to the libelant and others entitled a salvage award in the sum of \$17,500.00;
4. That respondent vessel may be condemned and sold to pay the award made to libelant and others; and
5. That libelant be granted such other and further relief as to the Court seems just.

HERBERT R. LANDE

Proctor for Libelant [8]

[Verified.]

[Endorsed]: Filed Apr. 30, 1947. Edmund L. Smith,
Clerk. [9]

[Title of District Court and Cause]

CLAIM

To the Honorable, the Judges of the United States District Court for the Southern District of California, Central Division:

The Claim of Marion Joncich, Joe C. Mardesich, and Antoinette Bogdanovich, to the Oil Screw "Pioneer", her tackle, apparel, and equipment, now in the custody or about to be seized by the United States Marshal for the Southern District of California, at the suit of libelant above named, alleges that the said Marion Joncich, Joe C. Mardesich, and Antoinette Bogdanovich are the true and lawful owners of said Oil Screw "Pioneer", her tackle, apparel and equipment; that no other person is the owner thereof.

Wherefore, these claimants pray that this Honorable Court will be pleased to decree a restitution of the same to said owners, and otherwise to administer right and justice in [10] the premises.

ANTOINETTE BOGDANOVICH

for and on behalf of Antoinette Bogdanoch,
Marion Joncich, and Joe C. Mardesich.

McCUTCHEN, THOMAS, MATTHEW,

GRIFFITHS and GREENE

HAROLD A. BLACK

PHILIP K. VERLEGER

Proctors for Claimants

[Verified.]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jun. 5, 1947. Edmund L. Smith,
Clerk. [11]

[Title of District Court and Cause]

ANSWER TO LIBEL

To the Honorable, the District Court of the United States
for the Southern District of California, Central Division:

The answer of Marion Joncich, Joe C. Mardesich, and Antoinette Bogdanovich, as owners of the Oil Screw "Pioneer", her tackle, apparel and equipment, as proceeded against by Andrew Xitco, for and on behalf of the owners and crew of the American Oil Screw vessel called the "North Queen", alleges as follows:

I.

Answering the allegations of paragraph I of the libel, alleges that claimants lack sufficient information to answer the allegations of said paragraph I, and therefore deny said allegations, and ask that libelant be put to strict proof thereof. [12]

II.

Answering the allegations of paragraph II of the libel, alleges that claimants lack sufficient information to answer the allegations of said paragraph II, and therefore deny said allegations, and ask that libelant be put to strict proof thereof.

III.

Answering the allegations of paragraph III of the libel, alleges that claimants lack sufficient information to answer the allegations of said paragraph III, and therefore deny said allegations, and ask that libelant be put to strict proof thereof.

IV.

Answering the allegations of paragraph IV of the libel, admits that the Oil Screw "Pioneer" was built in 1944. Denies that the value of the "Pioneer" was \$175,000.00 at the time the services in question were rendered, and in this behalf alleges that the sound value of said "Pioneer" at such time was approximately \$134,500.00, and that, due to damage previously suffered, the actual value of said Oil Screw "Pioneer", at the time the "North Queen" assisted said "Pioneer", was approximately \$114,000.00.

V.

Answering the allegations of paragraph V of the libel, admits that on the night of January 9, 1947, at approximately 6:30 P. M., at low tide the "Pioneer" was sailing in waters off Laguna Beach, California; that at such time said vessel stranded on a shelf of rock approximately $\frac{3}{4}$ of a mile off said beach; that said vessel then immediately sent out a call for assistance on its radio while at the same time taking steps to free itself [13] by jettisoning stores and lightening ship. Denies that the "Pioneer" was being pounded by breakers and a ground swell. In this behalf claimants allege that the "Pioneer" was not in breakers; that there was substantially no wind on said night; that there was only a slight swell; and that the night of January 9, 1947, was calm. Denies that the "Pioneer" was so stranded that her own means could not remove her; and in this behalf alleges that the "Pioneer" stranded at low tide, that the means of propulsion of said "Pioneer" were undamaged and that she had no leaks in her hull following said stranding, and that it is probable that the said "Pioneer" would have been freed by the rise in tide through the use of her own power. Denies all

of the allegations of said paragraph V not heretofore admitted.

VI.

Answering the allegations of paragraph VI of the libel, admits that a manila line was taken by a skiff from the "Pioneer" to the "North Queen"; that this manila line was attached to a steel cable belonging to the "Pioneer"; that the "North Queen" took said manila line from the skiff and, by pulling upon it, drew the said steel cable on board the "North Queen". Alleges that claimants lack information and belief sufficient to answer the allegations of said paragraph VI respecting the manner in which said cable was secured to the "North Queen", and therefore deny said allegations, and ask that libelant be put to strict proof thereof. Denies that the said "North Queen" was maneuvered close to the place where the "Pioneer" was stranded, and in this behalf alleges that the purpose of carrying the line by skiff to the "North Queen", as aforesaid, was to permit the said "North Queen" to maintain a reasonable and safe distance from the "Pioneer". Admits that the aforesaid cable parted, in part at least, on the first occasion that the [14] "North Queen" took a strain on said cable, but alleges that claimants lack information sufficient to answer the allegation of said paragraph VI that the line from the boom to the cable was released in time so as to hold the end of the cable, and therefore asks that libelant be put to strict proof of said allegation. Denies that there was any danger of bringing down the rigging of the "North Queen"; denies that great skill and ingenuity were required to free the "Pioneer", and in this behalf alleges that freeing of the "Pioneer" required merely the pulling by the "North Queen" on the line from the "Pioneer" for a space of 10

minutes or less. Alleges that the total time expended by the "North Queen" in assisting the "Pioneer", including time coming to and going from the place where such assistance was rendered, was under 2 hours. Denies each and every, all and singular, the allegations of said paragraph VI not heretofore admitted.

VII.

Answering the allegations of paragraph VII of the libel, denies said allegations.

VIII.

Answering the allegations of paragraph VIII of the libel, admits that the salvage services rendered by the "North Queen" were valuable to the "Pioneer", and that they resulted in the freeing of the "Pioneer". Denies that they were rendered under conditions which were difficult or dangerous, and alleges that they were services of the simplest type involving merely pulling on a cable for 10 minutes or less. In this behalf, claimants allege that there was another vessel standing by at the time the "Pioneer" was pulled free, and that if the "North Queen" had encountered any substantial difficulty, the services of said vessel were available for use, in addition to those of the "North Queen". Alleges, in [15] view of the facts heretofore alleged, that the services rendered by the "North Queen" were of a low order of salvage.

IX.

Answering the allegations of paragraph IX of the libel, denies that a fair and reasonable salvage award would be the sum of \$17,500.00; and alleges that a liberal award would not exceed the sum of \$1,000.00, and that claimants are ready and willing to pay said sum of \$1,000.00

to libelant at any time, in satisfaction of their claim for salvage, or any sum adjudged proper by this Honorable Court.

X.

Answering the allegations in paragraph X of the libel, admits that the premises are within the admiralty and maritime jurisdiction of this Court. Denies that the allegations of the libel are true, except as heretofore admitted.

Wherefore, claimants pray:

1. That this Honorable Court decree that libelant is entitled to recover a fair and proper award for salvage.
2. That claimants have and recover their costs of this action.
3. That claimants be granted such other and further relief as the Court deems just.

McCUTCHEN, THOMAS, MATTHEW,
GRIFFITHS and GREENE

HAROLD A. BLACK

PHILIP K. VERLEGER

Proctors for Respondent and Claimants [16]

[Verified.]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jun. 5, 1947. Edmund L. Smith,
Clerk. [17]

[Title of District Court and Cause]

REQUEST FOR AND ORDER RELEASING
VESSEL FROM CUSTODY OF MARSHAL

Whereas, a libel in rem has heretofore been filed in the above entitled matter; and

Whereas, said Oil Screw "Pioneer", her tackle, apparel, and equipment have been or are about to be seized herein by the United States Marshal; and

Whereas, security satisfactory to libelant has been arranged in the above entitled matter;

Now Therefore, libelant hereby consents and stipulates that the said Oil Screw "Pioneer", her tackle, apparel, and equipment, be released from the custody of the United States Marshal.

Dated: Los Angeles, California, May 23rd, 1947. [18]

HERBERT R. LANDE

Proctor for Libelant

It Is So Ordered:

Dated: June 5, 1947.

LEON R. YANKWICH

United States District Judge

[Endorsed]: Filed Jun. 5, 1947. Edmund L. Smith,
Clerk. [19]

[LIBELANT'S EXHIBIT NO. 6]

In the District Court of the United States, Southern
District of California, Central Division

In Admiralty. No. 6897-Y

Andrew Xitco, Jr., Libelant, vs. Oil Screw "Pioneer",
Her Tackle, Apparel, and Equipment, Respondent

LIBELANT'S INTERROGATORIES

To the Claimants Marion Joncich, Joe C. Mardesich and
Antoinette Bogdanovich, and to McCutchen, Thomas,
Matthew, Griffiths and Greene, their proctors:

The above-named claimants are hereby requested to answer, under oath, on behalf of themselves and the said respondent vessel the following interrogatories propounded by the libelant:

1. Precisely where did the Pioneer become stranded on the night of January 9, 1947, and at what time did she go on the rocks?

2. What was the speed of the Pioneer immediately prior to her stranding?

3. After running upon the rocks what was the exact position of the vessel and in what position was her bow, keel and stern? [20]

4. Were there ground swells present at the time of stranding, and if so what were their direction?

5. What was the contents of the message for assistance that was sent by the Pioneer and at what time was it sent?

6. What means, if any, of the Pioneer were used to remove her off the rocks prior to the arrival of the North Queen?

7. At what time did the North Queen arrive?

8. At what time did the North Queen pull the Pioneer free?

9. Precisely what portions of the Pioneer were damaged by the stranding?

10. If the keel of the Pioneer was damaged, exactly what portions and parts were damaged?

11. What was the cost of repairs to the Pioneer resulting from the stranding, and precisely what portions of the vessel were repaired?

12. What was the weight of the anchor, or anchors, carried on board of the Pioneer on the night of January 9, 1947?

13. Where on the vessel were the anchors carried?

14. What was the length of the anchor cable?

15. What other lengths of cable were carried on board the vessel?

16. What blocks were carried on board, and what were their capacities?

17. Is it not true that when the North Queen arrived at the scene of the stranding, the master of the Pioneer requested the master of the North Queen to take a line from the Pioneer and endeavor to pull the Pioneer off the rocks [21]

18. Was there any catch of fish on board the Pioneer at the time of stranding, and if so, what was its weight?

Dated: August 15, 1947.

HERBERT R. LANDE

Proctor for Libelant [22]

[Affidavit of Service by Mail.]

Case No. 6897-M. Xitco vs. "Pioneer", Libelant's Exhibit 6. Date 10-31-47. No. 6 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. E. M. Enstrom, Jr., Deputy Clerk.

[Endorsed]: Filed Aug. 18, 1947. Edmund L. Smith, Clerk. [23]

[LIBELANT'S EXHIBIT NO. 7]

In the United States District Court for the Southern District of California, Central Division

In Admiralty. No. 6897-Y

Andrew Xitco, Jr., Libelant, vs. Oil Screw "Pioneer", Her Tackle, Apparel and Equipment, Respondent.

ANSWER TO LIBELANT'S INTERROGATORIES

1. Answer to libelant's first interrogatory: The Pioneer became stranded at approximately 6:30 p. m. Her position was $3/4$ of a mile directly off shore from the hotel at Laguna, California.

2. Answer to libelant's second interrogatory: The speed of the Pioneer immediately prior to her stranding was approximately seven knots.

3. Answer to libelant's third interrogatory: The position of the vessel was parallel to the shore line, about $3/4$ of a mile out. Claimants believe that the keel was on an underwater rock table. The bow of the Pioneer was in an easterly and southerly position and the stern of the vessel was in a westerly and southerly position. [24]

4. Answer to libelant's fourth interrogatory: There were no swells noticed at the time the Pioneer stranded. A slight swell was noticed while the Pioneer was on the strand.

5. Answer to libelant's fifth interrogatory: The Pioneer broadcast the word "Mayday" over its radio telephone, which is a distress signal, and asked that any boats in a position to do so some immediately to its assistance. The message was sent immediately upon stranding.

6. Answer to libelant's sixth interrogatory: Prior to the arrival of the North Queen, the Pioneer had attempted to back off the rock table under its own power. It attempted thereafter to place its anchors at a distance from the Pioneer in order to use them in an attempt to pull the Pioneer off. At the time the North Queen arrived, the Pioneer was preparing to pump water and fuel oil overboard.

7. Answer to libelant's seventh interrogatory: The North Queen arrived at about 7 p. m.

8. Answer to libelant's eighth interrogatory: The Pioneer came off the strand at about 8 p. m.

9. Answer to libelant's ninth interrogatory: The keel shoe, keel, forefoot, stem band, forefoot sheathing, fathometer, hull fitting blocks, caulking in bottom butts and seams, rudder, quadrant and steering gear, rudder stuffing box, propeller blades, tail shaft, stern bearing and stuffing box, and screens on sea suction all showed damage or were disturbed.

10. Answer to libelant's tenth interrogatory: The keel of the Pioneer was damaged along its full length.

11. Answer to libelant's eleventh interrogatory: The portions of the vessel specified heretofore as damaged were repaired. The cost of repairs to the Pioneer resulting from the stranding [25] was \$16,432.20.

12. Answer to libelant's twelfth interrogatory: The Pioneer had one 400-lb. anchor and one 600-lb. anchor.

13. Answer to libelant's thirteenth interrogatory: One of the anchors was carried on the port and the other on the starboard hawse hole on the bow of the Pioneer.

14. Answer to libelant's fourteenth interrogatory: The 400-lb. anchor had a 125-fathom chain attached; the 600-lb. anchor had a 100-fathom chain attached.

15. Answer to libelant's fifteen interrogatory: The Pioneer had one 250-fathom 5/8-inch steel cable, and one 500-fathom 5/8-inch steel cable.

16. Answer to libelant's sixteenth interrogatory: The Pioneer had one 14-inch double block, which claimants believe can safely lift approximately five tons, possibly more. The Pioneer had one single block containing two 12-inch single roller blocks, believed capable of safely lifting about two tons. The Pioneer also had an ordinary cargo block, probably capable of lifting safely one and one-half tons.

17. Answer to libelant's seventeenth interrogatory: Upon arrival the North Queen was requested by the Pioneer to take a line from the Pioneer and endeavor to pull the Pioneer off the rocks.

18. Answer to libelant's eighteenth interrogatory: There was no catch on board the Pioneer at the time of the stranding.

MARION JONCICH [26]

[Verified.]

[Affidavit of Service by Mail.]

Case No. 6897-M. Xitco vs. "Pioneer". Libelant's Exhibit 7. Date 10-31-47. No. 7 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. E. M. Enstrom, Deputy Clerk.

[Endorsed]: Filed Oct. 8, 1947. Edmund L. Smith, Clerk. [27]

[RESPONDENT'S EXHIBIT C]

In the District Court of the United States, Southern District of California, Central Division

In Admiralty. No. 6897-Y

Andrew Xitco, Jr., Libelant, vs. Oil Screw "Pioneer", Her Tackle, Apparel and Equipment, Respondent.

DEPOSITIONS OF JOHN JONCICH, ANDREW JONCICH AND LLOYD JUDY

(On Behalf of Claimants)

Everett, Washington,
August 29, 1947.
2:00 o'clock p. m.

Depositions of John Joncich, Andrew Joncich and Lloyd Judy, taken on behalf of Claimants at Everett, Washington, August 29, 1947, on behalf of Claimant, before Earl R. Field, Notary Public.

Original [28]

In the District Court of the United States, Southern District of California, Central Division

In Admiralty. No. 6897-Y

Andrew Xitco, Jr., Libelant, vs. Oil Screw "Pioneer", Her Tackle, Apparel, and Equipment, Respondent.

STIPULATION FOR TAKING OF DEPOSITION

It Is Hereby Stipulated by and between the undersigned parties that the deposition of the following named witnesses may be taken by claimants herein upon oral interrogatories at Court Room No. 2, Snohomish County

Court House, Everett, Washington, before Earl Field, Notary Public, or any other duly qualified Notary Public in the State of Washington:

The deposition of John Joncich shall be taken at 2:00 P. M. on September 2, 1947 at said Court Room before said Notary Public.

The taking of the deposition of Andrew Joncich shall be at 3:00 P. M., or following the completion of the deposition of John Joncich, on September 2, 1947 at said Court Room before said Notary Public. [29]

The taking of the deposition of Lloyd Judy shall be at 3:30 P. M., or following the completion of the deposition of Andrew Joncich, on September 2, 1947 at said Court Room before said Notary Public.

The taking of the said depositions shall continue for so long as is necessary, and may be continued from day to day, if necessary, for the full interrogation of the said witnesses.

Reading and signing of the depositions by the witnesses is waived.

Dated this 14th day of August, 1947.

McCutchen, Thomas, Matthew, Griffiths and Greene
(McCutchen, Thomas, Matthew, Griffiths & Greene)

Harold A. Black

(Harold A. Black)

Philip K. Verleger

(Philip K. Verleger)

Proctors for Respondent and Claimants

Herbert R. Lande

(Herbert R. Lande)

Proctor for Libelant, Andrew Xitco, Jr. [30]

In the District Court of the United States, Southern District of California, Central Division

In Admiralty. No. 6897-Y

Andrew Xitco, Jr., Libelant, vs. Oil Screw "Pioneer",
Her Tackle, Apparel, and Equipment, Respondent.

DEPOSITIONS OF JOHN JONCICH, ANDREW
JONCICH AND LLOYD JUDY

(On behalf of Claimants)

Everett, Washington,
August 29, 1947.
2:00 o'clock P. M.

Depositions of John Joncich, Andrew Joncich and Lloyd Judy, taken on behalf of Claimants herein, pursuant to stipulation for taking depositions hereto attached, upon oral interrogatories, at Courtroom No. 2, Snohomish County Courthouse, Everett, Washington, August 29, 1947 (the time of taking depositions having been advanced from the date of September 2, 1947, at the hour of 2:00 o'clock P. M., at the same time and place, and the same Notary Public)—the said depositions being taken before Earl R. Field, a Notary [31] Public in and for the State of Washington, residing at Seattle, Washington.

Gerald H. Bucey, Esq. (of Messrs. Merritt, Summers & Bucey), appearing for Messrs. McCutchen, Thomas, Matthew, Griffiths & Greene; and Harold H. Black, appearing as Proctor for and on behalf of Claimants; and

There being no appearance by Proctor, or attorney or counsel for and on behalf of Libelant;

Whereupon the following proceedings were had and testimony taken, to-wit:

Mr. Bucey: Let the record show that the time of taking these depositions had been advanced to the date of August 29, 1947, rather than the date noted in the stipulation hereto attached of September 2, 1947.

Let the record also show that the reading and signing of the depositions by the witnesses here present has been waived. I will first call Mr. John Joncich. [32]

JOHN JONCICH,

called as a witness on behalf of Claimant, pursuant to stipulation and advanced time of taking deposition hereto attached, being first duly sworn, testified upon oath by deposition as follows:

Direct Examination

By Mr. Bucey:

Q. State your name, please. A. John Joncich.

Q. What is your age? A. Thirty-three.

Q. Where do you reside?

A. In Everett, Washington.

Q. State whether or not you have any interest in a fishing vessel called the Sunlight? A. I have.

Q. What is your interest? A. Half.

Q. You have a half interest in her?

A. I have a half interest in her.

Q. Who owns the other half?

A. My brother, Andrew Joncich.

Q. What is the size of that boat?

A. 81 feet and one inch. [33]

Q. That is her length? A. That is her length.

Q. What is her beam? A. 22 feet.

Q. What is her depth? A. Ten feet, one inch.

Q. What kind of power does she have?

A. 250 horsepower, Atlas, diesel.

Q. On January 9, 1947, were you on board that vessel? A. That is right.

Q. Where were you with the vessel at that time?

A. I would say we were outside, about seven miles west of Dana Point.

Q. Is that in what is known as the Laguna Beach area? A. That is right.

Q. That is between what main California ports?

A. It is 30 miles from San Pedro Harbor.

Q. How much of a crew did you have aboard at that time? A. Eleven men, including myself.

Q. Was your brother one of the members of the crew? A. Yes, sir.

Q. Who was the Master of the vessel at that time?

A. I was.

Q. What were you engaged in doing?

A. Fishing for sardines. [34]

Q. At what time *or* day or night do you engage in that fishing?

A. Well, from dark until dawn—as long as the moon permits. If the moon is out we do not fish.

Q. You fish in the dark of the moon?

A. We fish in the dark of the moon, yes.

Q. Was it dark on this occasion?

A. Yes, it was dark.

Q. State whether or not your vessel had a radio telephone? A. It has.

Q. Did it have it at that time? A. Yes, sir.

Q. State whether or not on that night you heard any distress calls from any other vessel. A. I did.

Q. What vessel was it? A. The Pioneer.

Q. About what time of day or night was it when you heard that, if you recall?

A. Well, as I look back I think it was around between 7:00 and 7:30 at night.

Q. In the evening?

A. It was in the evening, it was dark.

Q. Your recollection of the exact time is what?

A. Between 7:00 and 7:30. I would say about that time. [35]

Q. Did you answer the call? A. I did.

Q. On your radio telephone? A. That is right.

Q. Did you get the position of the Pioneer over the radio telephone?

A. I got his approximate position, and I told him to spin his search light in the air, so I could get him definitely right in the spot.

Q. This message that came over the radio telephone from that vessel, did that say anything about the reason for their distress call?

A. No. They said they were on the rocks.

Q. State what you did at that.

A. After I got his position?

Q. Yes.

A. I went straight in towards the beach, towards his signal, his light signal—searchlight.

Q. How far did you have to go to reach him, from the point where you heard this call to where you found him?

A. Offhand, I would say about 20 minutes in to the beach, straight in towards him.

Q. That would be about how many miles, roughly?

A. Well, about three miles.

Q. When you arrived in the vicinity of this other vessel— [36] the Pioneer, you say it was?—

A. Yes.

Q. Was there any other vessel around, other than the Pioneer? A. There was the North Queen.

Q. Was that another fishing boat?

A. That was another fishing boat.

Q. What was the North Queen doing at that time?

A. They were getting a cable from the Pioneer, and if I can remember exactly I think they were starting to try to tow the Pioneer off the rock.

We came there, and we were late in getting there, because the North Queen happened to be closer and he heard the S.O.S. call, and saw the searchlight. I was able to answer the call, but he went directly to the lights, and he was trying to tow him in the meantime while we had come up to him.

Q. Just confine yourself to what you saw.

A. That is right. That is all I saw.

taking

Q. When you got there was he ~~towing~~ taking a tow-line off from the Pioneer, or was he already made fast to her with the tow-line?

A. I think he was already made fast to her, yes.

Q. Did you observe what kind of a place the Pioneer was stranded? [37]

A. I did, because I spotted everything around him there, and there was kelp outside of him, towards the sea. I don't recall how close it was from the rock to the beach, although I did notice that the rock was kind—was kind of breaking where it was sitting on top.

Q. You could see the water breaking over?

A. Yes; in the dark. We spotted it with our light.

Q. What kind of a night was it?

A. It was a very clear night. You could see his lights for three miles.

Q. You said there was no moon?

A. There was no moon.

Q. It was a dark night?

A. It was a dark night.

Q. But clear? A. It was clear.

Q. What was the condition of the sea?

A. Very, very light sea.

Q. Was there a swell running?

A. Very little; just rolling very little on the rocks.

Q. How close in to the Pioneer did you go with your boat?

A. As close as I dared. I would say it would be—I don't know, offhand—I could approximately say—I didn't want to get any closer than four fathoms of water to him, which probably would be maybe 100 feet or so from him. [38]

Q. With reference to the position of the North Queen, you go in as far as the North Queen was?

A. Not any further than he was. He was right alongside of me.

Q. Did you have a fathometer on your boat?

A. We have.

Q. And you had one at that time? A. Yes, sir.

Q. What was the depth of water when you went in alongside the North Queen?

A. Well, to recall it closely, I had one man on the fathometer, and I told him to let me know any farther than five fathoms. I was in about five fathoms.

Q. You went in to about five fathoms? A. Yes.

Q. How large a boat was the Pioneer?

A. I don't know how large she is. She is a lot larger than our boat.

Q. She was larger? A. Yes.

Q. Did she appear to be a diesel boat?

A. She is a diesel boat; yes, sir.

Q. State whether or not you made any preparations to assist in pulling the Pioneer off? A. I did. [39]

Q. What did you do?

A. I asked them that in case the North Queen could not pull them off with the one line they had on him, that we would have another line put on ourselves, and both boats try to tow him off.

Q. You communicated that to whom?

A. To the fellows from the boat. We talked to them on the boat.

Q. That was from the Pioneer?

A. Yes. We talked from boat to boat.

Q. You were within speaking distance then?

A. Yes. There was a skiff in between us, the skiff of the Pioneer. It was between us and the Pioneer, and I told the fellows in the skiff to tell the Skipper on the Pioneer that if the North Queen could not pull him out alone—if they wanted us to put a line on them also, we would do it—and they said that would be o.k.

But in the meantime the North Queen—they tried the first time, and that is why I asked them—the cable snapped, I think the first time—

Q. Did you see it snap?

A. Yes. We were along side. In case he couldn't do it the second time we would put a line on from both boats.

Q. After the cable snapped was that same cable used again?

A. I couldn't tell you that, if it was the same cable or [40] another cable.

Q. Did you see what kind of a cable it was?

A. No. It was dark. I have an idea what cable it was. It was probably the purse cable off the net. That is all I can say.

Q. Do I understand you that the North Queen made fast again to the Pioneer? A. Yes.

Q. And pulled? A. Pulled.

Q. Did you observe when the North Queen was pulling in what way she pulled?

seaward

A. She was pulling straight ~~sea-way~~, straight out to sea.

Q. Which way was the Pioneer heading?

A. The bow of the Pioneer was facing the shore, with the stern about a quarter out to sea.

Q. Then they pulled her straight astern?

A. I would say a 45-degree astern.

Q. State whether or not as you observed the North Queen she pulled straight astern, or whether she attempted to pull sideways at any time.

A. As far as I could see, she was pulling straight seaward

~~sea-way~~, straight out.

Q. Just in one position?

A. That is right. That was the quickest way, I guess. [41]

Q. Did you remain there during all the time that she was pulling, after you arrived there?

A. We stayed there until the Pioneer was free of the rock.

Q. You have spoken of kelp— A. Yes.

Q. Did you observe whether or not either the North Queen

~~Pioneer~~ or your vessel was in any danger of fouling the propellers in the kelp beds at the places where you went?

A. No. I did not get that close. I had my spot, spotted on the kelp, and I didn't want to go any closer.

Q. So far as you observed, state whether or not the North Queen

~~Pioneer~~ went into a place where she was in danger from kelp?

A. No; she was going off, outside of that rock. And after she was out she was out there and clear of the kelp and the rocks. That is all I wanted there for.

Q. State whether the North Queen, as you observed her, got into the kelp, where she would foul her propeller?

A. I could not say that. I never saw her. All we saw her, she was on the outside, with a line on her.

Q. During the time you observed her did she get into the kelp?

A. I don't know. I couldn't say, because we were staying outside of the kelp.

Q. You were staying out farther than she was?

A. We were right along side; maybe about 30 or 40 feet on [42] the side. We were just standing by.

Q. Did you observe any kelp around the North Queen?

A. Around her?—No,—not that I remember.

Q. State whether or not you were always able to keep in position, where there was enough water under you for safety. A. I was.

Q. Could you see, and did you observe where the tow-line was made fast, on the Pioneer?

A. I couldn't tell for sure, but I believe it was on his bitt, his tow bitt in the middle of the boat.

Q. Did you observe where the tow-line was made fast to the North Queen?

A. Yes, I did. They had all their deck lights. It was onto tied ~~under~~ their tow-bitt.

Q. When you speak of the tow-line being made fast to the tow-bitt of the Pioneer, are you referring to the first time when you saw it or the second time?

A. No. I imagine that line was tied to the tow-bit. I don't know whether it was around, because I couldn't tell. But seeing the boat was being towed at kind of an onto angle, sideways, I figured it was tied ~~under~~ the tow-bitt.

Q. About how long did the Sunlight stand by before the Pioneer was pulled off?

A. It is hard to say, because I never had no intentions of ever—I didn't have anything to do with the boat, or [43] anything—and I just stood there until the boat was pulled off. I would say approximately an hour and a half, anyway.

Q. Do you think it was that long?

A. I would say approximately an hour, or hour and a half. I don't want to commit myself to something I am not sure of.

Q. You are not sure it was that long?

A. No. It might have been longer, and might have been less. I couldn't say.

Q. Did you keep a log on the Sunlight?

A. I had no log on the Sunlight. The only log I had was the radio log.

Q. You didn't keep any bridge log at that time?

A. No.

Q. Was any notation made by you in any log of when you received this radio message?

A. No. I thought I had it in my log book, but I didn't make the call to the Pioneer, so I didn't put it down,—no time. Any time you make another call to some other boat you have to log it down. But I got the S.O.S. call, and I answered the call and that was it.

Q. You made no entries in the log?

A. I made no entries in the log. I thought I did it, but I didn't make any entry in my log. [44]

Q. You have looked at the log recently?

A. Yes.

Q. And there is no entry there?

A. No; not for the Pioneer.

Q. Where is that radio log now?

A. It is on the boat in Astoria, Oregon.

Q. Was there any entry made in the radio log, or anywhere else, as to when you arrived at the vicinity of the Pioneer? A. No.

Q. Nor was there any entry made any place by you, or anybody on board your boat, as to when the Pioneer was pulled off? A. No; there was not.

Q. When the Pioneer was pulled off, what was done then by the Pioneer and the North Queen?

A. That I cannot answer, because we left as soon as I asked them if everything was o.k.

Q. Did you observe whether the Pioneer proceeded away from that vicinity? A. No; I did not.

Q. Did you observe whether the North Queen did?

A. I did not. We left before they got through,—I guess picking up their tow-lines, or whatever they did.

Q. She was definitely off the reef?

A. Yes, she was off the reef; that is right. [45]

Q. What did you then do with your boat?

A. We went out looking for fish, for sardines. We resumed our fishing for the night.

Q. Was there time enough left that night to continue fishing in that vicinity, in that area?

A. Well, I don't just exactly remember what time the moon came up, or whether it was all night darkness, or what it was, but I believe we looked for fish after that. And if I am not mistaken, I think we went to San Pedro after midnight.

Q. And were there any other boats around in the vicinity of the Pioneer and the North Queen, outside of
~~from~~ your boat?

A. Well, there was a lot of boats around, fishing boats.

Q. How far away?

A. They were out, but in the same vicinity where we was—only three or four miles out, looking for sardines, scattered all over the Coast there.

There was one boat that came in there just after the Pioneer, just about when he was towed off, but I don't recall the name. But the boat just came in there when he was towed off.

Q. How close to the Pioneer did you go?—can you estimate?

A. It is pretty hard to say. I figure we was 100 or 150 feet. It is hard to say, offhand. [46]

Q. And that was about the same distance out that the North Queen was? A. Approximately, yes.

Q. You stated that you offered to assist in towing the Pioneer? A. Yes.

Q. Did you get any response to that offer?

A. I did.

Q. What was the response?

A. They said if the North Queen could not pull the Pioneer off the rocks that we could put in there, and the Sunlight could assist, both boats pulling it off; because it was the matter of the tide going out, and if the tide went out any further the Pioneer—I think it would be stranded there for a while longer. I definitely remember the tide was going out.

Q. Did you have any line aboard that would have been suitable for assisting the Pioneer?

A. I did. I had a 5/8ths inch cable.

Q. How long? A. Oh, I had about 450 feet.

Q. Did your boat have a towing bitt?

A. It has a regular towing bitt.

Q. Located where?

A. Amidships, behind the pilot house.

Q. In your opinion, from your familiarity with the Sunlight, was she capable of rendering assistance to the Pioneer in pulling her off the strand?

A. We were. [47]

Q. In standing by were you doing so in order to render assistance, if any assistance was requested by the Pioneer? A. We were standing by, yes.

Q. You were standing by for that purpose?

A. Yes. If one boat couldn't pull him off, the two of us might.

Mr. Bucey: That is all.

(Deposition concluded.)

ANDREW JONCICH,

called as a witness on behalf of Claimants, pursuant to stipulation and advance time of taking deposition hereto attached, being first duly sworn, testified upon oath by deposition as follows:

Direct Examination

By Mr. Bucey:

Q. Will you state your name, please?

A. Andrew Joncich.

Q. What is your age? A. Twenty-eight.

Q. Where do you reside?

A. Everett, Washington.

Q. State whether or not you have any interest in the motor vessel Sunlight.

A. I have a half interest.

Q. Were you on board that vessel on January 9, 1947? [48] A. Yes.

Q. How many men were on board the boat at that time, if you recall?

A. There were ten, and myself, was eleven.

Q. What were you and the other members of the crew and the vessel engaged in doing?

A. Sardine fishing.

Q. In what area was that?

A. As far as the area is concerned, I do not know.

Q. In fishing for sardines, what time do you fish for them? A. It night time.

Q. Does that fishing have to be at any particular time of night? A. It has to be a dark night.

Q. Was this night I have spoken of a dark night?

A. It was.

Q. Did you learn anything that evening about some distress call coming over the radio telephone?

A. No; I did not.

Q. Do you recall on that evening your vessel going to the vicinity of where some boat was stranded?

A. Yes; I remember that.

Q. Do you recall the name of that boat?

A. That was the Pioneer.

Q. How close to the Pioneer, where she was stranded, did your [49] boat go, if you recall?

A. That is hard to say. It is hard to judge how far it was. The Skipper knows more about how far it was than I do.

Q. Was there any other boat there when you arrived there? A. There was the North Queen.

Q. The North Queen was there? A. Yes.

Q. How close to the North Queen did you go?

A. We was approximately the same distance he was.

Q. Approximately alongside of it? A. Yes.

Q. Do you know when your boat started to go to this stranded vessel?

A. I don't know. I don't remember the time.

Q. Were you aware at that time that she was heading for some boat in distress? Were you told that?

A. I was up on the mast looking for fish, and I saw them heading for a light towards the beach, and then my brother told me to come down, because we were going over to the Pioneer. That is the only time I knew what was happening.

Q. About how long do you think it took you to get to the Pioneer, when you started in that direction?

A. I didn't even think how long it took, as far as that goes. [50]

Q. When your vessel arrived in the vicinity of the North Queen and the Pioneer, did you notice what the North Queen was doing?

A. He had a tow-line out when we came.

Q. Had a tow-line on the Pioneer? A. Yes.

Q. Did you observe whether or not the North Queen was pulling on the Pioneer?

A. He was pulling, and the cable snapped—the first time I noticed.

Q. Was it made fast again to the Pioneer?

A. Yes, sir; it was.

Q. Did you observe any further pulling by the North Queen?

A. The only pulling was pulling him off the rocks.

Q. I am not sure that you understood my question. What I meant by that was, after he made fast again did he pull? A. Yes.

Q. Did you make or hear any effort made by anyone on your vessel to assist in pulling the Pioneer?

A. Yes; I did.

Q. Who made that?

A. My brother, John Joncich.

Q. Did you hear what response was made to that?

A. Yes. He said to stand by, and if the North Queen couldn't do it themselves we would help them. [51]

Q. Do you know whether or not your boat had any line on board suitable for assisting in towing or pulling?

A. Yes, sir.

Q. What kind of a line was that?

A. It was a cable.

Q. Do you know the size of it?

A. It was 5/8ths inch.

Q. Do you know about the length of it?

A. It was about 450 feet.

Q. After that response was made did your vessel remain near by, alongside the North Queen?

A. You mean after the Pioneer asked us to stand by?

Q. Yes. A. We stayed by them, yes.

Q. Did you observe how the North Queen was pulling on the Pioneer?

A. It was pulling towards the sea.

Q. Did you observe whether they pulled straight out or whether they pulled sideways, one way and then the other?

A. Well, the boat was—it was facing in towards the beach, and it was pulling on the angle, stern out.

Q. The pulling by the Pioneer was in that direction?

A. Yes.

Q. Out towards the sea? [52]

A. Yes; out towards the sea.

Q. As far as you observed, did it continue pulling just that way? A. Yes.

Q. Did you observe whether or not the North Queen pulled the Pioneer off her strand?

A. Yes; he pulled it off.

Q. Was she pulled out free?

A. It was pulled out free from the rock.

Q. Did the Sunlight stand by during all that time?

A. The Sunlight stood by all the time, until the boat was pulled off the rock.

Q. After the Pioneer was pulled off the strand did you observe where she went, or where the North Queen went? A. No; I did not.

Q. Were both boats still in that vicinity when you left?
~~looked?~~

A. They were both there when we left.

Q. What did you proceed to do then with your boat?

A. We proceeded to resume fishing.

Q. Do you recall whether you did some more fishing that night?

A. I imagine we did. I could not recall how long it was.

Q. During this time that you proceeded to where the Pioneer and North Queen were, and during the time you were standing by, until the Pioneer was pulled off, what was the condition [53] of the sea?

A. It was a very light sea.

Q. Was there any swell?

A. There wasn't much swell at all. The boat was rolling very gently. She was rolling quite a bit at times, in the rough.

Q. You mean the Pioneer?

A. Yes, the Pioneer.

Q. You have referred to the swell as a light, gentle swell?

A. Yes.

Q. Was there any wind?

A. There was no wind that night.

Q. What was the visibility?

A. It was very clear.

Q. I think you have stated the moon was not shining that night?

A. No, it was not.

Q. Did you observe whether your boat when it went in to the vicinity of the North Queen got into kelps?

A. No; we just came to the edge of it; just as close as we could, that is all.

Q. Did you observe whether the North Queen was in among the kelp?

A. No; he was right on the edge of it, as close as we came to the Pioneer. [54]

Q. Do I understand you that the North Queen was not among the kelp?

A. Not that I remember; no.

Q. Did you observe whether there was kelp between the North Queen and the Pioneer?

A. In my brother's spotlight around there it was between us and the Pioneer.

Q. Do you have any idea how long it was between the time when the tow-line broke and the time when they re-secured it?

A. No, I couldn't say exactly what it was.

Q. Would you say it was ten or fifteen minutes?

A. When the line was broken, you mean, until he put the next line on?

Q. That is right.

A. Oh, I don't know. Maybe fifteen minutes or so, I guess. He couldn't get any line on it.

Q. How did they get from the North Queen to the Pioneer?

A. There was a little skiff which they had on the Pioneer. They came out and got the line.

Q. How long would you estimate that the Sunlight was standing by in the vicinity of the North Queen before the Pioneer was pulled free?

A. I imagine it was at least around an hour and a half.

Q. You think it was that long? [55]

A. I think it was about that long.

Q. Is that just an estimate?

A. That is an estimate, yes.

Q. That you make now? A. Yes.

Q. Did you take any note of the time?

A. No; I didn't take any notice at all. I know there was a lot of monkeying around, or something like that, but I never thought about it.

Q. Do you know what time it was when you first started from where you were fishing in towards the Pioneer? A. No; I don't know.

Q. Do you know what time it was you left there to go back fishing?

A. No. I didn't notice that, either.

Q. After you returned to fishing did you notice whether there were other boats fishing around in that vicinity?

A. After we resumed fishing, you mean?

Q. Yes.

A. There were boats out there, yes.

Q. Do you know how long you continued fishing after you resumed? A. I can't remember.

Mr. Bucey: I think that is all.

(Deposition concluded.) [56]

LLOYD JUDY,

called as a witness on behalf of Claimant, pursuant to stipulation and advanced time of taking deposition hereto attached, being first duly sworn, testified upon oath by deposition as follows:

Direct Examination

By Mr. Bucey:

Q. Your name is Lloyd Judy?

A. That is right.

Q. How old are you? A. Thirty-eight.

Q. Where do you reside?

A. Everett, Washington.

Q. Were you on the fishing vessel Sunlight on the afternoon and evening of January 9, 1947?

A. I was.

Q. In what capacity were you on that vessel?

A. Engineer.

Q. What kind of power does that vessel have?

A. 250 horsepower, Atlas, diesel.

Q. How long had you acted as engineer on that vessel?

A. From October 31st, or so, of 1945, up until now.

Q. What was the condition of those engines?

A. Very good condition. [57]

Q. While you were on duty were you stationed in the engine room? A. Part of the time, yes.

Q. On that afternoon or evening did you learn of any radio telephone distress call being received on your vessel? A. No.

Q. Do you recall your vessel going to the assistance of another vessel that was stranded?

A. I don't recall so going. All I know is when we arrived.

Q. Did you go out on deck after you arrived?

A. That is right.

Q. What vessel was the one that was stranded?

A. The Pioneer.

Q. Was there any other vessel there when you arrived?
A. The North Queen.

Q. When you arrived there what, if anything, was the North Queen doing?

A. She had a line on the Pioneer. I don't recall whether she was pulling on her or not. Anyhow, the line was between the Pioneer and the North Queen.

Q. Did you observe the North Queen pulling at any time on the Pioneer?

A. I went down in the engine room, and when I came back up again I just got up there in time to see the line snap between the North Queen and the Pioneer. [58]

Q. And then what was done?

A. They replaced the line. They secured it over again. I don't remember now just what they did.

Q. Did you observe them pulling on her after that?

A. That is right.

Q. Did you observe her pull the Pioneer off?

A. Yes. I was on deck then.

Q. Where was your vessel during that time?

A. We were the same distance from the Pioneer as the North Queen. We stayed about that far offshore.

Q. About how far from the North Queen?

A. Sometimes we were closer, and sometimes we were a little farther. We had to keep maneuvering to get out of the way.

Q. Were you within 100 feet of the North Queen?

A. Yes, at times.

hear

Q. Did you ~~have~~ anyone on your vessel make any offer to the Pioneer to assist?

A. Yes. I heard our Skipper tell the man—

Q. (Interposing) That was Mr. John Joncich?

A. Mr. John Joncich. I heard him tell the man in the Pioneer skiff that we would give them a line if they wanted it.

Q. Did you hear what was said in response to that?

A. They went over towards their boat, and then they hollered [59] back and told us if the North Queen couldn't make it they would take a line from us, also.

Q. Do you know whether or not the Sunlight had any suitable line on board?

A. We had our tow-cable.

Q. What kind of a cable was that?

A. A five-eighths inch cable

Q. About what length?

A. That you couldn't prove by me. I am the engineer.

Q. Where was that line?

A. It was on a reel on top of the pilot house.

Q. After the Pioneer was pulled off her strand did you observe whether she left there, or what she did?

A. We didn't stay there. We left as soon as she came afloat. We pulled out right away.

Q. Did you observe whether she was entirely free of the strand, in deep water?

A. She was free of the strand and in deep water, and out past the kelp into deep water.

Q. Did you observe whether there was kelp around the Pioneer?

A. Yes; there was kelp between us and the Pioneer.

Q. Did the Sunlight get into the kelp?

A. No, not that I know of.

Q. Did you observe whether the North Queen got into the kelp?

A. No, I don't know whether she did. She may have when she [60] received the tow-line, but while I was there I never seen her in the kelp.

Q. Have you ever had any experience in towing, or tug operations? A. Yes.

Q. In what capacity? A. As engineer.

Q. On tugs? A. That is right.

Q. In your opinion was the Sunlight, with her equipment and her power, capable of rendering assistance to the Pioneer? A. Yes.

Q. Do you recall how long it was between the time the Sunlight arrived in the vicinity of the North Queen and the Pioneer, and the time when the Pioneer was pulled free?

A. No, I do not. I never kept track of the time at all. As far as how long it took, I couldn't say one way or another. It seemed like it was a long time, but whether it was 45 minutes or two hours, I couldn't say.

Q. When the Sunlight left that vicinity was the North Queen and the Pioneer—were they still there?

A. They were, yes.

Q. Was the Pioneer floating free in deep water?

A. Yes, sir. [61]

Q. What did the Sunlight do after leaving there?

A. We went back out and resumed our fishing.

Q. Do you know how long you continued fishing that night?

A. No, I do not. I never paid any attention to it. I am up until the engines stop when we hit alongside the dock, so I don't pay any attention to it at all. I don't fish outside, anyhow. My job is in the engine room, and I do not pay any attention to that at all.

Mr. Bucey: I think that is all.

(Deposition concluded.) [62]

In the District Court of the United States, Southern District of California, Central Division

In Admiralty. No. 6897-Y

Andrew Xitco, Jr., Libellant, vs. Oil Screw "Pioneer", her tackle, apparel, and equipment, Respondent.

State of Washington)

: ss.

County of King.)

I hereby certify that beginning on the 29th day of August, 1947, before me, Earl R. Field, a Notary Public in and for the State of Washington, residing at Seattle, Washington, at Court-Room No. 2, Snohomish County Courthouse, at Everett, Washington, (the time of taking depositions having been advanced by oral stipulation of Proctors for the respective parties from the date of September 2, 1947, to suit the convenience of proctors and the witnesses, to be taken at the same place and before the same Notary Public), beginning at the hour of 2:00 o'clock p. m., the said depositions being taken before Earl R. Field, a Notary Public in [63] and for the State of Washington, residing at Seattle, King County, Washington, named in said attached stipulation; and

Gerald H. Bucey, Esq. (of Messrs. Merritt, Summers & Bucey), appearing for Messrs. McCutcheon, Thomas, Matthew, Griffiths & Greene), appearing as Proctor for and on behalf of Claimants; and

There being no appearance by Proctor or Attorney or Counsel for and on behalf of Libellant; and

The above named witnesses being by me first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth, and being carefully examined,

deposed and said as in the foregoing annexed depositions set out.

I further certify that the taking of said depositions was begun on the 29th day of August, 1947, and completed upon the same date.

I further certify that the said depositions have been reduced to typewriting under my personal supervision, and that the reading over by or to the said witnesses of their said depositions, and the subscriptions of the said witness to their said depositions, were by stipulation of Proctors for the parties and by themselves, the witnesses, expressly waived, and the said depositions have been retained by me for the purpose of sealing up and directing the same to the Clerk of the Court, as required by law. [64]

I further certify that I am not Proctor for nor or counsel or attorney to either or any of the parties named herein, nor am I interested in the event of the cause.

I further certify that the notarial and stenographic fees for taking said depositions, \$39.50, have been paid to me by the Claimants, and the same are just and reasonable.

Witness my hand and official seal at Seattle, King County, Washington, this 9th day of September, 1947.

(Seal)

Earl R. Field

Notary Public in and for the State of Washington,
residing at Seattle, Wash.

Case No. 6897-M. Xitco vs. "Pioneer". Respondent's Exhibit C. Date 10-31-47. No. C in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. E. M. Enstrom, Jr., Deputy Clerk.

[Endorsed]: Filed Sep. 17, 1947. Edmund L. Smith, Clerk. [65]

[Minutes: Saturday, November 1, 1947]

Present: The Honorable Paul J. McCormick, District Judge.

Further trial; Herbert R. Lande, Esq., present for libelant; Philip K. Verleger, Esq., present for respondent, and both sides answering ready, Court orders trial to proceed.

At 10:25 A. M. Attorney Lande argues to the Court for libelant. Attorney Lande states for the record that any award will be divided 39% to the boat; and 61% to the crew of eleven men, in equal amounts.

At 11:00 A. M. Attorney Verleger argues to the Court for respondent. At 11:30 A. M. Attorney Lande argues further for libelant in reply. At 11:38 A. M. Court makes statement and finds in favor of libelant a salvage award in the sum of \$12,000.00, and orders Attorney Lande to prepare findings of fact, conclusions of law and decree in accordance with Court's opinion within five days. [66]

[Title of District Court and Cause]

Honorable Paul J. McCormick, Judge Presiding

REPORTER'S TRANSCRIPT OF OPINION OF
THE COURT.

Los Angeles, California, Saturday, November 1, 1947

Appearances:

For the Libelant: Herbert R. Lande, Esq., 413 West Seventh Street, San Pedro, California.

For the Respondent: McCutchen, Thomas, Matthew, Griffiths & Greene, by Philip K. Verleger, Esq., 704 Roosevelt Building, Los Angeles, California. [68]

Los Angeles, California, Saturday, November 1, 1947.
10 A. M.

(Opening argument on behalf of libelant by Mr. Lande.)

(Argument on behalf of respondent by Mr. Verleger.)

(Closing argument on behalf of libelant by Mr. Lande.)

The Court: I think I can probably decide the issue now, gentlemen, with more security than by taking it under advisement.

The principles in these salvage cases are pretty well settled by the Federal Appellate Courts and the Supreme Court of the United States. They bring into play the question of discretion, and it is rather a heavy burden that is imposed upon the Admiralty Court. I am speaking now of the court of the first instance. We must first have in mind that the measure of an award is probably a bounty, it is a satisfaction for meritorious service performed under the perils of the sea and it is also the

degree of probability that ensues in the specific case under consideration.

We must so far as we can eliminate pure conjecture, because if we proceed on the theory of speculation or possibilities there would be no standard in admiralty suits where salvage was the issue. Here we had, according to the undisputed evidence, a calm or a relatively calm sea. The operation occurred during a month when weather is somewhat uncertain. I am saying that because I think the court has the [69] right to consider the history of the times, and to use its own knowledge of such matters, so that there could not be any definiteness with reasonable certainty as to what would ensue toward the latter hours of the night in question. The same condition of weather might have continued. On the other hand, there might have been some disturbances either by wind or wave that would have aggravated the situation. There was great peril there, not only because of the position of the "Pioneer", but because of the kelp that, according to the undisputed evidence, was present in large area, which was a serious interference with maneuvering ships of the size of the two ships in question. So that we have the peril of a ship that was in extremis. She was on the rocks. Whether she was fast or whether she was extricable is a pure matter of conjecture. The fact is she was extricated by the efforts of the libelant.

We must bear in mind that the libelant vessel was not equipped for salvage purposes. She was a fishing boat, and that factor should not be lost sight of in evaluating the type of service which she rendered to the disabled ship. She responded to the call, and in doing so, while probably not placing herself in a great peril on account of the distance separating the two vessels at the time

of the first movement, there was a good deal of danger to be apprehended in going close to the obstacles in the pathway, which had caused the [70] "Pioneer" to become fixed on the rocks.

The appearances, as they presented themselves to the "Pioneer", were such as to require immediate action, and the equipment that was available, the gear and the other appliances that were aboard the ship, had to be utilized in the best way possible, or at least in the best way that good seamanship would prompt those who were navigating the "North Queen".

The first movement was unsuccessful and, in my judgment, it is there that the high degree of skill has been established. The quickness with which the line was made safe for the purposes and the experience of the man who directed the operations for the second effort to extricate the "Pioneer" were of a very high order, in my judgment. They showed exceptional skill, according to the evidence, based upon experience of a high type of value in a situation such as that which confronted the "Pioneer" at the time. I think the maneuver in utilizing the principle of the lever showed real seamanship in extremis. If the pull had been straight, as it probably was primarily, there is a good deal of doubt under the evidence as to whether the operation would have been as successful. So that there was this high degree of skill manifested after the line parted, which, in my judgment, shows an exceptional skill in this operation.

Now, as to whether or not the operation was the sole [71] causative factor in floating the "Pioneer" so that she could continue on her way under her own power I don't know. It is rather a guessing matter. I doubt the security of the evidence that indicates that the bow of the

"Pioneer" was elevated five feet. I think it may have been that it appeared that way, but I doubt whether there could have been any movement on the "Pioneer" of any kind from the bridge if the bow had been up five feet. I think the other estimate is about as unsafe to adopt,—one foot. It was somewhere between those two, I think. You cannot measure those things with nicety.

The "North Queen" was endeavoring to salvage the ship which was disabled, and those who operated her were not concerned with measurements, excepting in so far as they would illustrate to a mariner, a seafaring man, whether his movements were too unsafe to risk. But whether it was five feet or one foot, I believe it was somewhere between those two.

I feel that the buoyancy of the sea itself was a contributing factor, but the movement of the leverage maneuver was, I think, the prime cause of extricating the "Pioneer". I believe the result was partially assisted by the buoyancy, by the movement of the sea itself, during the tide period that was involved in the movement. How much each contributed it is difficult to say. I think the major factor was the maneuvering of the vessel, the salvor, and that had it not been [72] for that movement the consequences that ensued to the disabled vessel might have been very serious. How serious I think is a pure matter of conjecture.

The period that was occupied in the operation is material, of course. It was somewhere between one hour and an hour and a half, and it engaged the attention of a large ship and a crew of eleven men, all of whom were participating in the salvage episode, and, as I say, particularly one, as the court has indicated, was especially valuable in the project.

So far as the loss of fish is concerned, the evidence there is a little nebulous. There is no evidence that fish were running in large quantities; in fact, I do not believe there was any evidence on that point at all, as to the fishing probabilities or potentialities that night. Both sides seemed to feel a little bit ticklish about that matter for some reason. I don't know what it was. In any event, there was no evidence excepting the fact that an inference is fair, I think, that a fishing boat of that size with a crew of eleven men, going down in those waters to fish on lays, would not have been out less they felt there was a fair prospect of a catch that night. The catch was abandoned because of the desire to assist in saving this ship after she had been disabled. I do not believe there is anything definite there upon which we can make any estimate with any security. It is doubtful whether we can say that they would have caught 190 [73] tons of sardines at \$40 a ton. They probably would have caught some fish and would have sold the fish which they caught, but the estimate in money, I mean in a specific amount of money, is rather insecure.

Some argument has been made about estimating awards on percentage bases. The more authoritative Federal Courts recently have looked with some disfavor upon that method. Take these large values of ships these days, or even take the smaller ships of little value, it is rather an insecure way to attempt to estimate the salvage value in an admiralty case on any such basis. It should not be left out of consideration, and is not left out of con-

sideration, but to say that the award should be 10 or 15 or 25 per cent, where the ship has been saved and where the damage has been considerable, in this case approximately \$16,000 to repair the keel and the other appliances of the ship, I do not believe should be done. I am not making the award either upon the possibility of there being a catch of the entire 190-ton capacity of the ship, nor upon the percentage of the value of either or both ships. I am not leaving those elements out of consideration, but I am not making the award essentially upon either of them.

With reference to the testimony as to the value of the "Pioneer", I think Mr. Scheibe's testimony on that is to be rather carefully surveyed. He fixed a replacement value, a new replacement value of about \$125,000, and then gave some formula [74] which he used which would bring it down to a value of approximately \$100,000. I don't know whether he included in that the value of the net at \$15,000. I don't believe he did. My estimate of the value would be approximately \$129,000, allowing a \$15,000 value for the fish net. The net was in serious danger of being destroyed because of the necessities of the case, and coming back to the feature of the case which most impressed the court, the activities of the seamen after the line parted, unless there had been a high degree of seamanship and of navigation in maneuvering the vessel—the captain is entitled to share the credit in that—there was danger of the net being lost or at least badly damaged. It was the maneuvering of the vessel in

a way to give leverage so that the greatest amount of beneficial force could be used on the disabled vessel, and at the same time taking proper precautions to not submit the salvor to an unusual risk. It is those two features which I think bring the case up into the dignity of a high degree of skill.

Taking all of the factors into consideration, it seems to me that an award of \$12,000 would be adequate. I think the respondent is way too low on \$1,000, and I think the libelant is rather high on \$17,500.

You will prepare findings and an award accordingly, Mr. Lande, for \$12,000 and costs. [75]

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 10 day of November, A. D. 1947.

MARIE G. ZELLNER

Official Reporter

[Endorsed]: Filed Nov. 20, 1947. Edmund L. Smith, Clerk. [76]

[Title of District Court and Cause]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial on October 31, 1947, in the above entitled court, Honorable Paul J. McCormick, United States District Judge presiding; Herbert R. Lande appearing as proctor for libelant, and McCutchen, Thomas, Matthew, Griffiths & Greene, by Harold A. Black and Philip K. Verleger, appearing as proctors for the respondent and claimants; and evidence oral and documentary having been taken and received, and the cause having been submitted for decision, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

I.

That it is true that at all times mentioned herein, libelant Andrew Xitco, Jr., was the master of the American oil screw vessel called the "North Queen"; and was and is a resident [77] of the Southern District of California, Central Division.

II.

That it is true that the "North Queen" is an oil screw vessel of one hundred fifty tons gross, and length of eighty-two feet; and that her value, including net, at the time of the salvage services hereinafter mentioned was \$135,000.00.

III.

That it is true that the "North Queen" was owned by the libelant, 25%; A. K. Anderson, 25%; Arne Strom, 25%; and Haldor Dahl, 25%; that the crew of said vessel consisted of libelant as master and ten other fishermen.

IV.

That it is true that the oil screw "Pioneer", official number 246153, is an American fishing vessel of a type known as a purse seiner; that said vessel is of 183 tons gross, 99 tons net, 86.5 feet in length, and was built in 1944; that the value of said vessel prior to the stranding on January 9, 1947, was \$114,000.00 and that said vessel carried a net of the value of \$15,000.00.

V.

That it is true that on the night of January 9, 1947, the respondent vessel "Pioneer" was sailing in waters off the coast of Southern California, that between 6:30 P. M. and 7:00 P. M. of said night, the said vessel was in waters off Laguna Beach, California; that at said time and place, said vessel was navigating near the shore and ran upon the submerged rocks known as Two Rock Point and became stranded; that said vessel thereupon immediately sent out a distress call for help over her radio; that the said vessel was then and there in peril in extremis, stranded on the rocks and surrounded by kelp; that her own means could not remove her from the strand; that immediate aid was required. [78]

VI.

That it is true that the master of the "North Queen" heard the distress call of the respondent vessel, responded thereto and immediately went to her aid; that the "North Queen" arrived at the place where the "Pioneer" was stranded at about 7:30 P. M.; that at said time, respondent vessel was in distress and danger in extremis; that upon the arrival of the "North Queen", the libellant maneuvered her close to the place where the "Pioneer" was

stranded, and at that time the master of the "Pioneer" called to the libelant and asked him to take a cable from the "Pioneer" and endeavor to pull that vessel off the rocks; that the libelant agreed to this, and a skiff came from the "Pioneer" carrying a manila line to the "North Queen"; that the manila line was attached to the steel cable from the "Pioneer"; that the "North Queen" took the cable from the skiff and pulled the line and cable aboard the "North Queen", and secured the cable to the main bitts aft; that in order to exert a pull on the cable, it was necessary to raise the cable over the platform and nets on the stern of the "North Queen", and that accordingly a line from the boom of the "North Queen" was used to raise the cable to sufficient height for clearance; that the "North Queen" thereupon began to pull and strain on the cable in an endeavor to free the "Pioneer"; that very shortly the cable parted, but that the line from the boom to the cable was released in time so as to hold the end of the cable and still allowing sufficient play so as not to bring down the rigging of the "North Queen"; that the said cable was again fastened to the bitts of the "North Queen" and the libelant and crew of the "North Queen" again endeavored to free the "Pioneer"; that during the next half hour, by the use of great skill and ingenuity, the master and crew of the "North Queen" pulled the "Pioneer" free of the rocks upon which she was stranded. [79]

VII.

That it is true that the respondent vessel "Pioneer" was stranded on the rocks in such a manner as to be in great peril from the sea and elements and was in the position of a ship in extremis.

VIII.

That it is true that the salvage services rendered by the "North Queen" and her crew and master were highly skillful and of a very high order of merit; that their manner of working the vessel off the rocks showed real seamanship in an emergency and exceptional skill based on experience of a high type; that the efforts of the "North Queen" and crew were the prime and major factor which resulted in the freeing and extricating of the "Pioneer" from the rocks.

IX.

That it is true that the cost of repair to the "Pioneer", arising from the stranding, was \$16,432.20.

X.

That it is true that the salvage services of the "North Queen", her master and crew, to the "Pioneer" were and are of a value of \$12,000.00.

CONCLUSIONS OF LAW

I.

That the libelant is entitled to recover of and from the respondent and claimants, the sum of \$12,000.00, with his costs herein.

Dated: November 12th, 1947.

PAUL J. McCORMICK

United States District Judge

Receipt of a copy hereof, and service thereof, on November 3, 1947, is hereby acknowledged. McCutchen, Thomas, Matthew, Griffiths & Greene, by Philip K. Verleger.

[Endorsed]: Filed Nov. 12, 1947. Edmund L. Smith, Clerk. [80]

In the District Court of the United States
Southern District of California
Central Division

In Admiralty. No, 6897-M

ANDREW XITCO, JR.,

Libelant,

vs.

Oil Screw "PIONEER", Her Tackle, Apparel, and
Equipment,

Respondent.

JUDGMENT

The above entitled cause came on regularly for trial on October 31, 1947, in the above entitled court, Honorable Paul J. McCormick, United States District Judge presiding; Herbert R. Lande appearing as proctor for libelant, and McCutchen, Thomas, Matthew, Griffiths and Greene, by Harold A. Black and Philip K. Verleger appearing as proctors for the respondent and claimants; and evidence oral and documentary having been taken and received; and the cause having been submitted for decision; and written findings of fact and conclusions of law having been made and filed herein;

Now, Therefore, It Is Ordered, Adjudged and Decreed that the libelant, Andrew Xitco, Jr., do have and recover from the respondent vessel "Pioneer", her tackle, apparel and equipment, and the claimants Marion Joncich, Joe C. Mardesich and Antoinette Bogdanovich, jointly and severally, the sum of \$12,000.00; plus [81] costs in the sum of \$40.00.

Dated: November 12th, 1947.

PAUL J. McCORMICK

United States District Judge

Receipt of a copy hereof, and service thereof, is acknowledged November 3, 1947. McCutchen, Thomas, Matthew, Griffiths and Greene, by Philip K. Verleger.

Judgment entered Nov 12, 1947. Docketed Nov. 12, 1947. C. O. Book 46, page 768. Edmund L. Smith, Clerk; by E. M. Enstrom, Jr., Deputy.

[Endorsed]: Filed Nov. 12, 1947. Edmund L. Smith, Clerk. [82]

[Title of District Court and Cause]

PETITION FOR APPEAL

To the Honorable Paul J. McCormick, Judge of the United States District Court, Southern District of California, Central Division:

Marion Joncich, Joe C. Mardesich, and Antoinette Bogdanovich, your petitioners, claimants herein, hereby pray that they may be permitted to take an appeal from the final decree entered herein on the 12th day of November, 1947, and from each and every part of said decree. Said claimants further pray that they may be permitted to take an appeal from the order entered herein on November 1, 1947, in the Civil Docket of said court, and in the minutes of said court, wherein it was ordered that libelant recover as salvage the sum of Twelve Thousand (\$12,000.00) Dollars. [83]

Your petitioners also desire that the bond for costs on appeal and the supersedeas bond filed herewith be

approved by this court, and that execution of the aforesaid final decree and the aforesaid order be stayed, pending the determination of the appeal herein.

Dated at Los Angeles, California, this 13 day of January, 1948.

McCUTCHEN, THOMAS, MATTHEW,
GRIFFITHS & GREENE
HAROLD A. BLACK
PHILIP K. VERLEGER

[Endorsed]: Filed Jan. 13, 1948. Edmund L. Smith,
Clerk. [84]

[Title of District Court and Cause]

ASSIGNMENTS OF ERROR

Marion Joncich, Joe C. Mardesich, and Antoinette Bogdanovich, claimants herein, hereby assign the following errors in the records and proceedings in this cause:

I.

That the court erred in finding that following the stranding, the respondent vessel Pioneer was "in peril in extremis".

II.

That the court erred in finding that following the stranding, the respondent vessel Pioneer's own means could not remove her from the strand.

III.

That the court erred in not finding and in not considering in determining the award that the Pioneer stranded very shortly [85] after low tide; that when the

Pioneer was stranded the waterline at her bow was approximately one foot out of water and the waterline at her stern about even with the water; that the weather was calm and that there was approximately a 5-foot rise of tide to be anticipated; that the Pioneer was not pounding or leaking and her means of propulsion were entirely sound and that it was likely that without assistance she would have succeeded in freeing herself before high tide on the night of her stranding.

IV.

That the court erred in that it did not find and did not consider in determining the award that it was likely that the Pioneer would free herself without assistance, except the assistance of the rising tide.

V.

That the court erred in finding and in considering, in determining the award, that the Pioneer was stranded on the rocks in such a manner as to be in great peril from the sea and elements.

VI.

That the court erred in that it did not find, and did not consider in determining the award that the Pioneer was not in immediate danger, but would have been in more serious danger if the weather took a change for the worse.

VII.

That the court erred in finding, and in considering, in determining the salvage award, that the salvage services rendered by the North Queen, her crew and master, were highly skillful.

VIII.

That the court erred in finding, and in considering in making the award, that the manner in which the North Queen and her crew and master worked the Pioneer off the rocks showed real [86] seamanship under an emergency and exceptional skill based on an experience of a high type.

IX.

That the court erred in finding, and in considering in making the award, that the salvage services performed by the North Queen, her crew and master, were of a very high order of merit.

X.

That the court erred in that it did not find and did not consider in making the award that the services rendered by the North Queen, her crew and master, did not call for or involve exceptional skill or heroism.

XI.

That the court erred in that it did not find or consider in determining the award, that the assistance rendered by the North Queen was rendered without substantial peril to, expense to, or sacrifice by the North Queen, her master or crew.

XII.

That the court erred in considering in determining the award, and in holding that the efforts of the North Queen, her crew and master, were the prime and major factor which resulted in freeing and extricating the Pioneer from the rocks.

XIII.

That the court erred in that it did not find or consider in determining the amount of the award that the rise in tide was the principal factor enabling the North Queen to release the Pioneer from the rocks.

XIV.

That the court erred in that it did not find or consider in determining the award that the vessel Sunlight was standing [87] by ready and willing to assist the Pioneer.

XV.

That the court erred in that it did not find or consider in determining the amount of the award that assistance other than the North Queen was available to the Pioneer.

XVI.

That the court erred in that it did not find or consider in determining the award that the Pioneer was close to port where further assistance could have been obtained.

XVII.

That the court erred in that it did not find or consider in determining the amount of the award that the North Queen was exposed to little or no danger in assisting the Pioneer.

XVIII.

That the court erred in that it did not find or consider in determining the amount of the salvage award that the services of the North Queen were performed without cost or expense, loss or damage, or substantial risk to the North Queen, its owners, master or crew.

XIX.

That the court erred in that it considered in determining the amount of the award that there was some probability of loss of fish to the North Queen, her owners, crew and master, resulting from the assistance rendered to the Pioneer.

XX.

That the court erred in finding that the salvage services of the North Queen, her master and crew, to the Pioneer, were and are of the value of \$12,000.00.

XXI.

That the court erred in adjudging, ordering and decreeing [88] that libelant recover from the respondent vessel Pioneer the sum of \$12,000.00.

XXII.

That the court erred in decreeing that libelant recover from claimants Marion Joncich, Joe C. Mardesich, and Antoinette Bogdanovich, jointly and severally, the sum of \$12,000.00, plus costs, for the reason that said claimants were not sued in personam and did not appear in personam.

Dated: January , 1948.

McCUTCHEN, THOMAS, MATTHEW,
GRIFFITHS & GREENE
HAROLD A. BLACK
PHILIP K. VERLEGER

[Endorsed]: Filed Jan. 13, 1948. Edmund L. Smith,
Clerk. [89]

[Title of District Court and Cause]

ORDER ALLOWING APPEAL

The Petition of Marion Joncich, Joe C. Mardesich, and Antoinette Bogdanovich, for an appeal from the final decree entered in the above entitled cause on the 12th day of November, 1947, and from the order entered in th above entitled cause on November 1, 1947, in the Civil Docket and in the minutes of said court, wherein it was ordered that libelant recover as salvage the sum of Twelve Thousand (\$12,000.00), is hereby granted and the appeal is allowed.

It Is Further Ordered, that a certified copy of the record herein be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

It Is Further Ordered that the bond for costs filed herein on January 13, 1948, be and the same is hereby approved. [90]

It is further ordered that the supersedeas bond filed herein be, and the same is hereby, approved, and that the execution of the aforesaid final decree, and of the aforesaid order, be, and is hereby stayed, pending the determination of the appeal herein.

Dated at Los Angeles, California, this 13th day of January, 1948.

LEON R. YANKWICH

United States District Judge

[Endorsed]: Filed Jan. 13, 1948. Edmund L. Smith, Clerk. [91]

[Title of District Court and Cause]

NOTICE OF APPEAL

Please Take Notice, that Marion Joncich, Joe C. Mar-desich, and Antoinette Bogdanovich, claimants in the above entitled case, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree entered herein on the 12th day of November, 1947, and from each and every part of said judgment; and from the order entered herein on November 1, 1947, in Civil Docket of said court, and in the minutes of said court, wherein it was ordered that libelant recover as salvage the sum of \$12,000.00 plus costs and from each and every part of said order.

Dated this day of January, 1948.

McCUTCHEN, THOMAS, MATTHEW,
GRIFFITHS & GREENE

HAROLD A. BLACK

PHILIP K. VERLEGER

Proctors for Respondent

[Endorsed]: Filed & mld. copy to Herbert R. Lande,
Atty. for Libelant, Jan. 13, 1948. Edmund L. Smith,
Clerk. [92]

[Title of District Court and Cause]

SUPERSEDEAS BOND

Know All Men By These Presents:

That Fireman's Fund Indemnity Company, a corporation, organized and existing under and by virtue of the laws of the State of California, and authorized to do a surety business in the State of California, is held and firmly bound to Andrew Xitco, Jr., in the full and just sum of \$12,000.00, to be paid to the said Andrew Xitco, Jr., or his duly designated attorney, executors, administrators or assigns; to which payment well and truly to be made we bind ourselves and administrators, jointly and severally, by these presents.

Whereas, lately, at a District Court of the United States for the Southern District of California, Central Division, in a [94] suit *depending* in said court between said Andrew Xitco, Jr., as libelant against the Oil Screw Pioneer, her tackle, apparel and equipment, respondent, and Marion Joncich, Joe C. Mardesich and Antoinette Bogdanovich, as claimants to said Oil Screw Pioneer, her tackle, apparel, and equipment, a decree was entered against the said respondent and against the said claimants, and the said claimants having filed in said court a notice of appeal, and a petition for the allowance of an appeal, to reverse the said decree in the aforesaid suit, the aforesaid appeal being directed to the United States Circuit Court of Appeals for the Ninth Circuit.

Now, the Condition of the Above Obligation Is Such, that if the said claimants shall prosecute the said appeal, to effect, and satisfy the judgment in full, together with costs, interest and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full any modification of the judgment and such costs, interest and damages that the Appeal Court may adjudge and award if said claimants fail to make said plea good, then the above obligation to be void; else to remain in full force and virtue.

Dated this 5th day of January, 1948.

FIREMAN'S FUND INDEMNITY COMPANY

By A. I. Stoddard

Its Attorney in Fact

State of California

County of Los Angeles—ss.

On this 5th day of Jan., 1948, before me, M. E. Beeth, a Notary Public in and for said County, State aforesaid, residing therein, duly commissioned and sworn, personally appeared A. I. Stoddard, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of Fireman's Fund Indemnity Company and acknowledged to me that he subscribed the name of Fireman's Fund Indemnity Company thereto as principal, and his own as attorney in fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at my office in the said County

of Los Angeles the day and year in this certificate first above written.

(Seal)

M. E. BEETH

Notary Public in and for the County of Los Angeles,
State of California.

My commission expires March 24, 1949.

The premium charged for this bond is \$120.00 per annum. [95]

Approved this 7 day of January, 1948.

HERBERT R. LANDE

Proctor for Libelants and Respondents.

Recommended for approval as provided in Rule 8.

McCUTCHEN, THOMAS, MATTHEW,
GRIFFITHS and GREENE

HAROLD A. BLACK

PHILIP K. VERLEGER

Proctors for Claimants and Appellants.

I hereby approve the foregoing bond this 13th day of January, 1948.

LEON R. YANKWICH

United States District Judge

[Endorsed]: Filed Jan. 13, 1948, Edmund L. Smith,
Clerk. [96]

[Title of District Court and Cause]

BOND FOR COSTS ON APPEAL

Whereas claimants, Marion Joncich, Joe C. Mardesich, and Antoinette Bogdanovich, have appealed or are about to appeal from that certain final decree heretofore made and entered in the above entitled cause on November 12, 1947, and from that certain order entered on November 1, 1947, and

Whereas, Fireman's Fund Indemnity Company, a corporation, organized and existing under and by virtue of the laws of the State of California, and authorized to do a general surety business in the State of California, is held and firmly bound unto the Libellant, and unto whom it may concern, in the sum of Two Hundred Fifty and no/100 Dollars (\$250.00) for the payment of which, well and truly to be made, it does hereby bind itself, its successors and assigns, firmly by these presents, and agrees that, in case [97] of default or contumacy on the part of said appellants or of the undersigned, execution may issue against it, its goods, chattels and lands;

Now, Therefore, the condition of this obligation is such that if the above named appellants shall prosecute said appeal with effect and pay all costs which may be awarded against them as such appellants if the appeal is sustained, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

Dated at Los Angeles, California, this 5th day of January, 1948.

FIREMAN'S FUND INDEMNITY COMPANY

By A. I. Stoddard

Its Attorney in Fact

State of California

County of Los Angeles—ss.

On this 5th day of Jan., 1948, before me, M. E. Beeth, a Notary Public in and for said County, State aforesaid, residing therein, duly commissioned and sworn, personally appeared A. I. Stoddard, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of Fireman's Fund Indemnity Company and acknowledged to me that he subscribed the name of Fireman's Fund Indemnity Company thereto as principal, and his own as attorney in fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at my office in the said County of Los Angeles the day and year in this certificate first above written.

(Seal)

M. E. BEETH

Notary Public in and for the County of Los Angeles,
State of California.

My commission expires March 24, 1949.

The premium charged for this bond is \$10.00 per annum.

Approved this 7 day of January, 1948.

HERBERT R. LANDE

Proctor for Libelants and Respondents

Recommended for approval as provided in Rule 8.

McCUTCHEN, THOMAS, MATTHEW,
GRIFFITHS & GREENE

HAROLD A. BLACK

PHILIP K. VERLEGER

Proctors for Claimants and Appellants

I hereby approved the foregoing bond this 13 day of January, 1948.

LEON R. YANKWICH

United States District Judge

[Endorsed]: Filed Jan. 13, 1948. Edmund L. Smith,
Clerk. [98]

[Title of District Court and Cause]

STIPULATION CONCERNING EXHIBITS

It Is Hereby Stipulated by and between the parties herto that the original exhibits filed and placed in evidence herein by the respective parties shall be forwarded to the Circuit Court of Appeals for the Ninth Circuit, and that said original exhibits may be considered by said Circuit Court of Appeals for the Ninth Circuit as part of the apostles herein. It is further stipulated that said exhibits need not be transcribed into Clerk's or Reporter's Transcripts herein.

McCUTCHEN, THOMAS, MATTHEW,
GRIFFITHS & GREENE
HAROLD A. BLACK
PHILIP K. VERLEGER

Proctors for Claimants and Appellants
HERBERT R. LANDE
Proctor for Libelant and Respondent

It is so ordered.

Dated: Feb. 6, '48.

PAUL J. McCORMICK
United States District Judge

[Endorsed]: Filed Feb. 6. 1948. Edmund L. Smith,
Clerk. [101]

[Title of District Court and Cause]

[Affidavit of Mailing of Praeceptum for Apostles, Petition for Appeal, Assignments of Error, and Order Allowing Appeal.]

[Endorsed]: Filed Jan. 15, 1948. Edmund L. Smith,
Clerk. [102]

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[Title of District Court and Cause]

APPLICATION FOR ORDER ALLOWING EXTENSION OF TIME IN WHICH TO FILE APOSTLES ON APPEAL

To the Honorable the District Court of the United States in and for the Southern District of California, Central Division:

Claimants and appellants, Marion Joncich, Joe C. Mardesich, and Antoinette Bogdanovich, hereby apply for an extension of time in which to transmit the apostles on appeal in the above entitled cause to the Ninth Circuit Court of Appeals, and in which to file the said apostles with said court, to and including the 21st day of March, 1948. Said application is made on the ground that the clerk of said District Court has not yet been able to complete the preparation of said apostles. Claimants further allege in this behalf that said clerk is at present unable to complete the preparation of said apostles for the reason that the reporter's transcript has not yet been filed with said clerk; that claimants are advised that said reporter's transcript has in fact been completed but that the [106] reporter is presently holding the said transcript awaiting a convenient opportunity for the Honorable Paul J. McCormick, Judge in and for said District Court, to examine the said transcript. Claimants are further advised that the preparation of the said transcript was delayed somewhat by reason of the necessary presence of the said reporter at a trial of various causes at San Diego. The time for transmitting the said apostles to the United

States District Court presently expires February 21, 1948, and claimants believe that even if the said reporter's transcript were immediately placed in the hands of the said clerk, there would be some risk that it would not reach the clerk of the said Circuit Court of Appeals in San Francisco, California, by said date of February 21, 1948.

Dated this 19th day of February, 1948.

McCUTCHEN, THOMAS, MATTHEW,
GRIFFITHS AND GREENE
HAROLD A. BLACK
PHILIP K. VERLEGER

[Endorsed]: Filed Feb. 19, 1948. Edmund L. Smith,
Clerk. [107]

[Title of District Court and Cause]

ORDER EXTENDING TIME

It Is Hereby Ordered that claimants and appellants, Marion Joncich, Joe C. Mardesich, and Antoinette Bogdanovich may have to and including the 21st day of March, 1948, in which to transmit the apostles on appeal herein to the Ninth Circuit Court of Appeals and to file the said apostles with the said Ninth Circuit Court of Appeals.

Done this 19th day of February, 1948.

PAUL J. McCORMICK
United States District Judge

[Endorsed]: Filed Feb. 19, 1948. Edmund L. Smith,
Clerk. [108]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 108, inclusive, contain the original Citation and full, true and correct copies of Libel in Rem for Salvage; Claim; Answer to Libel; Request for and Order Releasing Vessel From Custody of Marshal; Libelant's Interrogatories (Libelant's Exhibit No. 6); Answer to Libelant's Interrogatories (Libelant's Exhibit No. 7); Depositions of John Joncich, Andrew Joncich and Lloyd Judy; Minute Ordered Entered November 1, 1947; Opinion of the Court; Findings of Fact and Conclusions of Law; Judgment; Petition for Appeal; Assignments of Error; Order Allowing Appeal; Notice of Appeal; Supersedeas Bond; Bond for Costs on Appeal; Praecipe for Apostles; Stipulation and Order Concerning Exhibits; Affidavit of Mailing; Supplementary Praecipe and Application and Order Extending Time for Filing and Docketing Apostles on Appeal which, together with original Libelant's Exhibits Nos. 1, 2, 3, 4, 5, and 8; original Respondent's Exhibits A, A1, A2, A3, B and C and copy of the Reporter's Transcript of proceedings on October 31, 1947, transmitted herewith, constitute the Apostles on Appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$25.15 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 8 day of March, A. D. 1948.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke

Chief Deputy

[Title of District Court and Cause]

Honorable Paul J. McCormick, Judge Presiding
REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, Friday, October 31, 1947
Appearances:

For the Libellant: Herbert R. Lande, Esq., 413 West Seventh Street, San Pedro, California.

For the Respondent: McCutchen, Thomas, Matthew, Griffiths & Green, by Philip K. Verleger, Esq., 704 Roosevelt Building, Los Angeles, California. [1*]

Los Angeles, California, Friday, October 31, 1947.
10:00 A. M.

The Court: Call the case, Mr. Clerk.

The Clerk: No. 6897-M Admiralty, Andrew Xitco, Jr. v. Oil Screw Pioneer, Her Tackle, Apparel, and Equipment, for trial.

Mr. Lande: Ready for the libellant, your Honor.

Mr. Verleger: Ready for the respondents, your Honor.

The Court: Proceed with the evidence.

Mr. Lande: Mr. Xitco.

The Court: I have read the pleadings, gentlemen, and the memoranda, and I think I should call counsel's attention to what probably are the latest expressions of the Ninth Circuit on the one issue that seems to be in this case, the amount of salvage; first, to the "Eureka," decided by the Ninth Circuit on June 10, 1936, and reported in 36 A.M.C., at 1179, and a later decision by the same court, the Ninth Circuit Court of Appeals, the "Melody," decided October 8, 1946, and reported in 46 A.M.C., at page 1637. The latter case seems to be somewhat analogous on this issue. Proceed. [2]

*Page number appearing at top of page of original Reporter's Transcript.

ANDREW XITCO, JR.,

the libelant herein, having been first duly sworn, testified in his own behalf, as follows:

Direct Examination

The Clerk: Be seated, please, and state your name.

The Witness: Andrew Xitco.

The Clerk: Andrew Xitco, Jr.?

The Witness: Andrew Xitco, Jr., yes.

By Mr. Lande:

Q. Mr. Xitco, what is your occupation?

A. Master on fishing vessels.

Q. What is the vessel you are on at the present time?

A. The boat "North Queen."

Q. How long have you been master of that vessel?

A. I have been master of fishing vessels for the last of August.

Q. Prior to that how long have you been engaged as master of fishing vessels?

A. I have been master of fishing vessels for the last 25 years, since 1922.

Q. On what type of vessels have you served?

A. On fishing vessels.

Q. What type of fishing vessels?

A. Purse seine boats.

Q. Were you master of the North Queen on January 9, [3] 1947? A. Yes.

Q. How many men were in your crew at that time?

A. Eleven men, including myself.

Q. How was that vessel engaged on January 9th?

A. In sardine fishing.

(Testimony of Andrew Xitco, Jr.)

Q. Now, on January 9th of this year during what hours were you engaged in fishing, actually fishing sardines?

A. Oh, actually fishing sardines, from a little after dark to the coming up—until the moon starts rising.

Q. Do you recall about what time that was, that the moon started to rise?

A. Around 9:00 o'clock, I think.

Q. So about how many hours of actual fishing did you have that night? A. Two hours.

Q. Now, what was the capacity of the North Queen for sardines on January 9th?

A. Well, the capacity of the boat is around 190 tons.

Q. What was the price of sardines per ton at that time? A. \$40.

Q. Now, at what time did you receive the call for assistance from the Pioneer?

A. We heard an S.O.S. call at 7:10 P. M.

Q. And whereabouts were you at that time? [4]

A. We were about two miles, two or three miles south-east of the boat,—I mean west northwest..

Q. What did you do after receiving the distress call?

A. We proceeded that way at full speed, and the radio operator was talking to the radio operator on the Pioneer.

Q. Where did you find the Pioneer?

A. We found her right in front of Laguna on Two Point Rock, or, Two Rock Point.

Q. That is off of Laguna Beach?

A. Off of Laguna town and beach.

Q. Is that point marked on the charts?

A. Yes, it is.

(Testimony of Andrew Xitco, Jr.)

Q. What type of bottom is there at Two Rock Point?

A. It is rocky and kelpy; lots of kelp and rock.

Q. What was the weather when you arrived at the scene of the stranding?

A. Well, the weather was calm, but there was a big ground—I mean, there was a ground swell. There is always the surf, the rising and falling of the sea. You couldn't hardly notice it until you got on the beach, or if you were on the rock you would notice the ground swell. If you were out there free, you wouldn't notice it as much as if you were attached to the ground some place.

Q. What is the ground swell?

A. Just the rising and lowering of the water. [5]

Q. That is a rising and lowering independent of any tides?

A. Yes.

Q. What was the position of the Pioneer in relation to these swells?

A. She was broadside.

Q. Do these swells have a direction?

A. Well, yes, they generally are from the southwest.

Q. How did the Pioneer appear to you, as you came up to her?

A. Well, she was from 30 to 45 degrees off of the shore line. She wasn't parallel with the shore line. She was about 30 to 45 degrees off of the parallel.

Q. Which way was her bow pointing?

A. Her bow was pointing towards Laguna Beach in an easterly direction.

Q. Now, will you step up to the blackboard there and just draw a rough sketch of the shore line and the position of the Pioneer, as you came up to her?

A. I am not much at drawing. This is Newport (indicating).

(Testimony of Andrew Xitco, Jr.)

The Court: Keep your voice up, Mr. Xitco, so you can be heard.

The Witness: O. K. This is Newport, see, and this is Dana Point, and Laguna is right here, and the beach would be [6] right here, and right here is Two Point Rock.

Q. By Mr. Lande: Excuse me. Go ahead. Use the red crayon on there to show the position of the Pioneer.

A. That is it.

Q. Where is north on your diagram?

A. Well, north—this is east (indicating). This would be west. That would be south, and this would be north.

Q. And in what direction were your ground swells coming from?

A. They were coming more from—

Q. Will you put an arrow there to indicate that?

A. Yes. I would say from southwest. That is what you always get.

Q. All right. What was the appearance in the water of the Pioneer, as you came up to her?

A. Well, over half of the bow was up out of the water. The water line was up about 5 feet, and the stern water line was even with the water, with the sea.

Q. Now, just let me take the green crayon and I will draw this green line to show the surface of the sea. Will you sketch in, from a side view, how the Pioneer appeared to you?

(The witness did as requested.)

Q. Now, I notice you have made a red line. What does that signify? [7]

A. That is the water line, the copper paint line, between the white and the green, and this here part was sitting in the water, and this was out of the water. In other words, if she was floating right, when she was off

(Testimony of Andrew Xitco, Jr.)

of the rocks, she would be way down to there, she would come down to that water line.

Q. When the boat is floating normally is the portion below the red line under water?

A. Yes. Well, no. The red line is about 5 or 6 inches above the sea level, when she is floating.

Q. Was this a part of her bottom, referring now to the portion below the red line?

A. Yes. That is the bottom. This is the copper paint, from here down.

Q. Will you show slanting lines of red to show that is the copper paint part of the boat?

A. This is sea water (indicating), and probably the boat would come down like this.

Mr. Verleger: May I suggest, your Honor, that the sketch be marked for identification?

Mr. Lande: We will do that when he is finished.

The Court: You have indicated the sea water toward the stern of the ship with red crayon, have you?

The Witness: What is that?

The Court: Which is the bow and which is the stern? [8]

The Witness: This is the bow. This is the stern.

The Court: Instead of saying "this," mention it in nautical terms, if you understand them. If you don't understand them, of course, do not attempt to do so.

The Witness: This is the bow of the Pioneer (indicating) and this is the stern of the Pioneer.

The Court: Proceed. But don't say "this" or "that," but mention the points that you are referring to in exact terms, if you can.

(Testimony of Andrew Xitco, Jr.)

The Witness: Well, that is the bow and the stern. I don't know what else you would call them.

The Court: Instead of calling anything "this," mention it in terms. You have indicated the sea water line in red crayon, have you?

The Witness: No, this is the copper paint. This would be copper paint, all the way down in here (indicating).

The Court: Now, you are saying "this." The copper paint is what you are now drawing?

The Witness: All the red is the copper paint part of the boat, and here (indicating) is the sea water.

The Court: Now, what are you doing to make the sea water?

The Witness: Using the green chalk.

Q. By Mr. Lande: Above the green line is what you saw when you came up to the Pioneer? [9]

A. Yes, sir.

Q. What is underneath the green line is what the rest of the hull would probably be? You didn't know when she was on the rocks what was below that, did you?

A. No, but I just drew it there.

The Court: Where was she lying with respect to the rocks that were discernible to you?

The Witness: I didn't quite get that.

The Court: I will put it in a little different language. Where was she lying when you first saw her with respect to the rocks you were able to see?

The Witness: She was lying, as I said here, on this angle (indicating).

Mr. Lande: I don't think you understand the question.

The Court: Don't lead him. That is a clear question to a mariner.

(Testimony of Andrew Xitco, Jr.)

Mr. Lande: It assumes the point that the rocks were discernible. I don't think they were. If the court would ask the question whether those rocks were discernible, or whether there is a ledge of submerged rock, or what—

The Court: You may ask him the question.

Mr. Lande: Will you take the stand?

The Court: If you have finished with the diagram, you had better take the stand. If you haven't finished, go ahead.

Mr. Lande: May I show the water line as drawn by the [10] witness on the outline of the hull, labeling it "Water Line"?

The Court: Well, put an "A" and "B" as an indication. Put an "A" on one end of it and a "B" on the other.

Mr. Lande: I will put an "A" and "A-1," your Honor, because he has a "B" over there for the bow.

The Court: All right.

Mr. Lande: May I label the outline of the shore there and the position of the boat with the Roman numeral I, and the outline of the boat as he observed it when he came there with the Roman numeral II?

The Court: So ordered.

Q. By Mr. Lande: Now, Mr. Xitco, these rocks that are at that point, are they above water or below water?

A. They are below water.

The Court: At all times?

The Witness: Well, I wouldn't know that.

The Court: Then say so if you don't know. You have answered the question.

Q. By Mr. Lande: At the time you came up there, were the rocks above or below water, on the night of January 9th? A. I didn't see no rocks.

(Testimony of Andrew Xitco, Jr.)

Q. Now, I will show you a model here of a purse seiner. Will you hold up this purse seiner model to the court and illustrate how the Pioneer looked on the rocks, stranded there, as you came up to her? [11]

Mr. Verleger: May I intrude with a question, Mr. Lande? Are you planning on putting that model into evidence?

Mr. Lande: No.

Mr. Verleger: Your Honor, I would object to having any portion of the testimony given with reference to something which is not in evidence, because of the fact that it will not be a portion of the record if a record becomes necessary.

The Court: If it is used for illustration, the dimensions or the scale should be in the record, and the model should be left here.

Mr. Lande: It is not my model, your Honor, and I would like to use it merely for the purpose of illustration and not as a diagram of anything, but just for the edification of the court.

The Court: But there may be others who may want to be edified, too, and may want to know what the instrumentalities of identification are in the record. If you are going to use anything, you had better have it in the record.

Mr. Lande: It is not mine to put in the record. I borrowed it from a gentleman at San Pedro.

The Court: Objection sustained for the reasons stated.

Mr. Lande: May we do this, your Honor, that if we use it now we submit a photograph of it later?

The Court: If that is satisfactory to the other side, and if the dimensions of it and its correlative compari-

(Testimony of Andrew Xitco, Jr.)

son [12] with the ship in question are in the record, that will be all right.

Mr. Lande: I can lay that foundation.

Mr. Verleger: I think I would have no objection if it were placed in the record, Mr. Lande, and a photograph accurately showing it were later substituted.

Mr. Lande: I will have to withdraw it for the purpose of having a photograph taken.

The Court: Let me ask the witness: Do you know anything about this model, Mr. Xitco?

The Witness: It is a model of a purse seiner.

The Court: How does it compare with the distressed ship we are talking about, the Pioneer?

The Witness: Well, the Pioneer is a purse seiner.

The Court: I know that, but that doesn't give the court any information about it. Do you know what her beam was, her length, her equipment, and apparatus?

The Witness: This here I wouldn't know anything about, this one. This is just a model of a fishing boat, a purse seiner. Well, a fishing boat is a little different, the pilot-house is. The hulls are practically all the same.

Q. By Mr. Lande: The rigging and the mast are the same?

A. Yes, the rigging and all are the same.

Q. Are the general proportions and dimensions similar [13] to that of the Pioneer? A. Yes.

The Court: You say the pilothouse is entirely different?

The Witness: No. I mean,—you see, this break here. Well, that is straight. At this break here, it goes straight back instead of having that there shoulder, and he doesn't have his portholes here.

The Court: Who doesn't have the portholes?

(Testimony of Andrew Xitco, Jr.)

The Witness: Well, the Pioneer doesn't have portholes. This boat does. But the rigging, and the boom, and the mast is all on the same principle.

The Court: The same principle. What do you mean by that? All ships are on the same principle, if they have an engine, aren't they?

The Witness: No.

The Court: What is the difference?

The Witness: Well, you wouldn't see this here (indicating).

The Court: Say what that is.

The Witness: See this here mast and boom. On a tugboat it wouldn't be equipped the same as it is equipped on a purse seine boat.

The Court: Is that the only difference between a tugboat and a purse seine boat?

The Witness: Well, a purse seine boat is built to carry [14] men and has a fish hold in it.

The Court: I don't think we are getting anywhere with this line of evidence. It does not give the court any view of the ship at all. A ship can be described nautically. If you want to use this for illustrative purposes and it is satisfactory to the other side to make a photograph of it, you may withdraw it for that purpose.

Mr. Lande: Yes, that is all I wish to use it for, and I will withdraw it and have it photographed.

Mr. Verleger: That I think is satisfactory, pending further discovery as to what it is going to be used for.

Q. By Mr. Lande: Mr. Xitco, is it your testimony that this hull is in general the same outline as that of the Pioneer? A. Yes.

(Testimony of Andrew Xitco, Jr.)

Q. Now, will you hold that hull up in your hand and show the court how the Pioneer appeared as you came up to it when she was stranded?

The Court: Of course, she wasn't resting in a frame like that?

The Witness: No.

The Court: Can't you take it out of that frame?

Mr. Lande: No, it is glued on there.

The Court: That doesn't give much information. Mark it for identification, Mr. Clerk. [15]

The Clerk: Yes, your Honor. It is marked Libelant's Exhibit 1, for identification.

(The model referred to was marked Libelant's Exhibit No. 1, for identification.)

The Court: Now refer to it as such, Mr. Lande, from now on. And, Mr. Xitco, wait until he finishes the question before you answer. The reporter has to get everything that is said here.

Q. By Mr. Lande: Referring to Libelant's Exhibit 1, for identification, will you hold it in your hand, please, and will you show the court the angle at which you saw the Pioneer stranded when you came up to it on the night of January 9th?

A. About like this (indicating).

The Court: Just answer it the way you think it ought to be.

The Witness: This is the way it appeared to me. This (indicating) is the coast line, and this is the way it appeared to me.

The Court: Now, describe that in your own language. Suppose you were talking to a seafaring man, what would you tell him?

(Testimony of Andrew Xitco, Jr.)

The Witness: She was about 30 to 45 degrees off the parallel of the coast line, and this here water line was out about 5 feet, and it tapered back to where the water line was [16] even with this here coast line. In other words, this here water line was out of the water and you could see it for 4 to 5 feet.

Mr. Verleger: May I intrude? I think the record should show what he is referring to when he says "this here water line." I would like to have a record which is reasonably intelligible.

The Witness: The bow was up around 5 feet.

The Court: Out of the water?

The Witness: Out of the water.

The Court: Out of the surface of the sea?

The Witness: Yes, out of the surface of the sea. The water line at the bow of the boat was out 5 feet from the surface of the sea.

Q. By Mr. Lande: And how was the stern,—down?

A. And the stern very gradually come down to the water line.

Q. What part of the stern?

A. About the turntable back; from here (indicating), the corner of the turntable back.

Q. Now, was there any motion to the Pioneer as you came up to her?

A. I would say just rolling a little.

Q. Which way was she rolling?

A. Broadside. [17]

Q. That is from side to side, you mean?

A. Yes.

Q. And about how many degrees of roll did she have when you came up to her?

A. I judge around 10 degrees.

(Testimony of Andrew Xitco, Jr.)

Q. 10 degrees to each side? A. Yes.

Q. Now, was there any kelp in the vicinity of the Pioneer? A. Yes.

Q. Was the Pioneer in the kelp?

A. The kelp was around here.

Q. How close did you come to the Pioneer?

A. Oh, about 200 feet.

Q. And did you hear any talk from the Pioneer at that time?

A. Well, we could hear their voices, but it was mostly all going over to Joe and to this Vince Pakusich, who were talking over the phone, the transmitter.

Q. Now, as you came up tell the court what happened.

A. Well, as we come up to the boat we saw a few of the crew members in a small skiff, who had a line in there, and they were out rowing towards us. We got up as close as we thought we could get to the kelp and were going to pull it out toward the bow, but then we turned around. [18]

Q. When you came in, you came in bow first?

A. Yes.

Q. Will you tell the court why you did that?

A. I was afraid to back in because if I hit the bow I would keep on going, and if I bent my propeller I would be useless myself.

Q. What danger were you afraid of, so far as your boat was concerned?

A. Well, ruining the rudder and propeller, if I went the other way.

Q. On what? A. On the rocks.

Q. You felt the danger then, from the same rocks that the Pioneer was stranded on? A. Yes.

(Testimony of Andrew Xitco, Jr.)

Q. So you came in bow first, and you saw the skiff out there? A. Yes.

Q. Then what happened?

A. Then they threw us the line. They had about a 3-inch new line tied to a wire $\frac{5}{8}$ -inch rope, and we swung the boat around. We knew we didn't have the power to back the bow enough. We had pretty good power. We had a direct reversible, but we thought to give it a straight pull, so we turned it around, and Mr. Berry and the other crew members [19] hooked it up to the bitt.

Q. You turned the boat around, you mean?

A. We turned it around, and was very careful in getting as close as possible.

Q. Did you pull their wire cable aboard?

A. We pulled that Manila line aboard that was attached to the wire cable, and we pulled enough wire cable aboard to tie it to the bitt and rig it up.

Q. And at that time was the stern of your vessel pointed towards—

A. It was pointed towards the shore line, towards the Pioneer.

Q. Now, what did you have, if anything, on the stern of your vessel?

A. Well, we had our purse seine net and a skiff.

Q. Was the purse seine net on the vessel itself?

A. It was on the turntable.

Q. Whereabouts on your vessel was the turntable?

A. Just like that (indicating).

Q. Just explain it.

A. On the stern of the boat we had a turntable 20 by 21.

(Testimony of Andrew Xitco, Jr.)

Q. And how high off the deck was the top of the turntable?

A. Around the center, the center of the turntable, the deck has a curve at from 12 to 16 inches on the ends off the [20] deck.

Q. How much higher than that, that is, what was the distance from the top of your net to the deck?

A. Around 5 feet.

Q. Now, could you take a line from the Pioneer to your bow over your net and turntable?

A. We couldn't do it very well.

Q. Explain to the court why not.

A. Well, if you had it over the turntable, you wouldn't have much control of your boat, and the way we rigged it up on that double block and had a stop on the chain, it was fastened to the bitt; and that is the center of the boat (indicating), and it worked just like a B-bolt.

Q. Now, will you step to the board again, please. Have you got the crayons?

A. They are right there.

Q. Come over to the side here, and will you draw an outline of your vessel, the North Queen?

A. I don't have much room here.

Q. It will have to be a small outline, then. Draw it as she lay in the water here.

A. Well, our bow was facing out this way (indicating).

Mr. Verleger: May I make a suggestion? That is, that we take this diagram down and mark it for identification, and place a separate diagram up there, to cover that illustration, [21] so that we don't confuse the witness.

(Testimony of Andrew Xitco, Jr.)

The Court: If you have finished with it, I think that would be a good suggestion. If you have finished with it, you might follow that procedure, Mr. Lande.

Mr. Lande: We are not finished with it, your Honor, but we will tack another one on down below.

The Court: Now, read the question, please, so that you may have it in mind.

(The record was read.)

Mr. Verleger: May I suggest also, your Honor, that both of these be marked for identification now, so that we will know which diagram is being referred to.

The Court: What will the second one be, Mr. Clerk?

The Clerk: The top diagram will be Libelant's Exhibit No. 2, for identification, and the lower one will be No. 3, for identification.

(The diagrams referred to were marked Libelant's Exhibits Nos. 2 and 3, for identification.)

The Court: The lower one is the one he is speaking about now. Proceed.

Q. By Mr. Lande: Draw the entire outline of the vessel, please, and use the entire sheet of paper.

A. As she looks in the dry dock?

Q. No, as she looks in the water.

A. (Drawing.) This is the turntable. This is the [22] sardine net.

Q. Here is my pen, and you can mark that.

A. Do you want to see where the wire was?

Q. No, just draw the outline of the vessel before you brought their cable on board.

(The witness did as requested.)

Q. Now, will you draw the water line, please?

(Testimony of Andrew Xitco, Jr.)

The Court: You had better make the water line a different color of chalk, Mr. Xitco. Otherwise it will be confusing.

Now, have you used red chalk there?

Mr. Lande: Yes, your Honor.

The Court: And the rest of the drawing is in green crayon?

The Witness: That's right.

The Court: Is that right?

The Witness: I didn't get you.

The Court: The rest of the drawing is in green crayon?

The Witness: Yes, it is.

The Court: The entire outline of the ship, with the exception of the water line, is in green crayon?

The Witness: Yes. Well, you are not supposed to see this (indicating).

Q. By Mr. Lande: Take my pen and label the turntable and your net. Now, have you written "Turntable" on there? [23]

A. Yes.

Q. Now, label the net.

A. Well, this (indicating) is the net.

The Court: You have done so, have you, Mr. Xitco? We have to have a record here. You know, someone may want to read this later on and we want them to be able to read it intelligently. You have indicated there the net?

The Witness: That is the net and the turntable.

Mr. Lande: Resume the stand, please. May the record show that Mr. Xitco has drawn on Libelant's Exhibit 3, for identification, an outline profile of the North Queen. May we introduce that in evidence, your Honor?

(Testimony of Andrew Xitco, Jr.)

The Court: So ordered.

The Clerk: So marked.

(The diagram, heretofore marked Libelant's Exhibit 3, for identification, was received in evidence.)

Mr. Lande: At the same time, your Honor, may we introduce Libelant's Exhibit No. 2 in evidence?

The Court: So ordered.

The Clerk: So marked.

(The diagram, heretofore marked Libelant's Exhibit 2, for identification, was received in evidence.)

Q. By Mr. Lande: Will you step down to Libelant's Exhibit 2, please, Mr. Xitco, and show the position of the North Queen in green crayon after you took a line from the [24] Pioneer to your boat and had turned your vessel so that your bow was headed out to sea?

The Court: Now, is he using the same colored chalk to do that as he did the other? It will be confusing if he does.

Mr. Lande: He is using green crayon, and the Pioneer on the rocks is in red crayon.

The Court: Very well.

(The witness did as requested.)

Mr. Lande: May I label the object just drawn "North Queen" and the vessel towards the shore as "Pioneer"?

Q. By Mr. Lande: You have shown on the diagram that the North Queen was on a line with the Pioneer; is that correct?

A. Yes, when we started pulling.

Q. Now, why did you have it in that position?

A. Well, we figured that is the way she went on.

(Testimony of Andrew Xitco, Jr.)

The Court: A little louder, please, so that we can hear you.

The Witness: We figured that is the way she went on, so to get her off, why, she had to come off the same as she went on.

Q. By Mr. Lande: Now, will you take my pen and draw the line between you and the Pioneer as you started to pull? [25]

A. Draw the line?

Q. The cable.

A. Well, our cable went right over the sardine net and over towards here (indicating).

Q. Draw it in heavier, and have it complete.

(The witness did as requested.)

Q. Now, referring to Libellant's Exhibit 3, will you use my pen, or, rather, use this pencil and will you draw in the manner in which the cable was rigged that went from the Pioneer to your vessel, the North Queen?

(The witness did as requested.)

Q. Now, will you explain that diagram to the court, please, what you have drawn in there?

A. This is the $\frac{5}{8}$ -inch wire that the Pioneer handed to us.

Mr. Verleger: May that be marked—

Mr. Lande: Just a minute, Mr. Verleger. We will get it in if you will wait just a moment.

Mr. Verleger: All right.

Q. By Mr. Lande: Will you mark that wire cable with the word "Cable"?

What size cable was that? A. $\frac{5}{8}$ -inch.

Q. The record will show the witness has written " $\frac{5}{8}$ " cable" on the line drawn here. Where was the cable [26] attached?

A. It was attached to the bitt here (indicating).

(Testimony of Andrew Xitco, Jr.)

Q. All right. Will you write "Bitt" in there?
(The witness did as requested.)

Q. I show you two photographs, Mr. Xitco, and ask you if those are fair representations of the bitts of the North Queen. A. Yes.

Mr. Lande: Counsel has seen them, your Honor. May I offer them in evidence, your Honor, as Libelant's next in order?

The Court: So ordered.

The Clerk: Marked Libelant's Exhibits 4 and 5 in evidence.

(The photographs referred to were marked Libelant's Exhibits 4 and 5, and were received in evidence.)

Q. By Mr. Lande: Will you continue with your explanation, please?

A. Well, we first wrapped the wire around the bitt, and there was a shackle on the end of it, and we clamped it around to here, so it tightened up.

Q. What do you mean by "to here"?

A. This wire we clamped, shackled it onto the outgoing wire and fastened it to the bitt. Then we got our double block, and this double block is on a 3½-inch rope. [27]

Q. How many strands of rope are in that block?

A. There is four, and then we got a chain—

Q. Will you label that "Double Block," the line as "Double Block." Now tell us about the chain.

A. We put—we have got a slip made out of chain, and we wrapped it around the wire two or three times so she wouldn't slip. Then we hooked the double block, the hook of the double block into the chain and wrapped it on our winch, so we would get it off the turntable

(Testimony of Andrew Xitco, Jr.)

and net, three or four feet up, so that if you swing it would not rest on the net and would give us control of the boat. This other end was fastened on the bitt.

Q. Is it correct that the control of the length of the double block line was at the bitt there?

A. Yes, it was tied to the bitt here (indicating). That is the control of the double block.

Q. Now, were there fishermen stationed at the bitt?

A. Yes.

Q. Now, will you label your boom and mast on that, please?

(The witness did as requested.)

Q. Now, will you resume the stand, please. Showing you now Libelant's Exhibit 1, for identification, I will ask you if you have rigged some rope on that vessel to illustrate the manner in which you had the wire cable from the Pioneer to your vessel? Have you done so? [28]

A. Yes.

Q. All right. Explain what you have done.

Mr. Verleger: I would like to object, your Honor, on the ground there is no showing that the rigging of that model corresponds to the rigging of the Pioneer, and judging by the picture I have just looked at, I don't think it does.

Mr. Lande: Let's ask the witness.

Q. By Mr. Lande: Mr. Xitco, does the rigging on that model correspond to or is it a fair illustration of the rigging on your North Queen? A. Yes, it is.

The Court: What do you mean by "a fair illustration"?

The Witness: Well, that looks just like on the North Queen here; the boom, the mast, the stays, the forward

(Testimony of Andrew Xitco, Jr.)

stay, and this is the crow's-nest, and the ladders going up, and the bitt down here.

The Court: Overruled. Read the question.

(The question was read.)

The Witness: Well, this is the wire from the Pioneer (indicating).

The Court: That is the string you are now holding?

The Witness: Yes.

The Court: Wait until I finish because somebody may later want to read the record and if it just states "this" and "that," it will not mean anything to them. [29]

You are referring to a piece that looks like hemp string there which you have attached to this model, Mr. Xitco?

The Witness: Yes.

The Court: Very well. Now, if you will follow that line, you will get into the record just what you are saying and what you mean, so that someone who reads it and does not see what you are doing will understand it.

The Witness: This string represents the $\frac{5}{8}$ -inch wire that come off of the Pioneer. Is that the way?

The Court: That is right.

The Witness: Then we pulled it aboard, got it aboard so that we had enough to wrap around the bitt there. We were in the meantime drifting until we got it all rigged up. This here represents the double block. This string represents a double block.

The Court: That is the string that projects down the boom towards the stern?

The Witness: Yes. That represents our double block, the $3\frac{1}{2}$ -inch line, and we had a slip wire or chain, and

(Testimony of Andrew Xitco, Jr.)

we put it over a couple of times, so that it would not slip and would stay there. We had our skiff over the stern here. It was not on the turntable. It was tied up behind there. So that wire was fastened to our bitt, and they fastened it over on their boat there.

The Court: What did they fasten it onto on their boat? [30]

The Witness: It was over—it was fastened some place over on their boat. It came from the Pioneer, and they fastened it over on their boat, too; must have fastened it.

The Court: You don't know where it was fastened?

The Witness: No, I don't know where it was fastened. Then we had—this is the double block, and this other line that leads to the bitt was tied here, wrapped around this bitt here to keep it up, to keep it up as we start pulling, and she would never lower herself down. In the meantime, we had the whole free, then, and we could control our boat either way. And if it was way down on the net here, you couldn't control the boat very good, and you couldn't turn it. This way it was right on top, and the main reason for that was so that it wouldn't cut the net in half, and the turntable, and all. Then we started pulling a direct pull, and it snapped right in here (indicating).

The Court: Now, describe that. Describe the point at which it snapped.

The Witness: Well, it snapped between the chain that was holding this wire, between there and the bitt on the North Queen.

The Court: That would be on the lead line, the pulling line?

(Testimony of Andrew Xitco, Jr.)

The Witness: No, on the wire. This double block was tied here. That was rope. That (indicating) was $\frac{5}{8}$ -inch [31] wire going to the Pioneer, and it snapped between this one holding it there with the chain slip there, between the chain and there (indicating).

Well, when that snapped it put an awful strain on this double block, on this that was fastened to the bitt, and the rig and everything started shaking, and I slowed it down right away and put it in reverse, and before we got it Ronnie Nordstrum, who was by the bitt, he let it go, let the leads go. If he didn't loosen that, it would probably all have come down, but he was quick enough to think fast and he let it go, so that we just reached the back end of it here.

Q. By Mr. Lande: Now, will you step to Libelant's Exhibit 3 and put a little "X" at the approximate place that you think the cable parted on your first attempt.

The Court: Where was that, Mr. Xitco?

The Witness: Right ahead of the bitt. If she snapped here (indicating), we would not have any control, but we had the wire at all times. We were fortunate.

Q. By Mr. Lande: Resume the stand. Now, on the first attempt, when you pulled with your vessel, how much power did you give your vessel?

A. Well, we had her going almost full speed at a direct pull.

Q. You were pulling directly? [32]

A. Yes, but I mean to say you tighten up on the wire and give her the speed gradually.

Q. So that at the time she snapped, you were going—

A. We were going at almost full regular speed at that time.

(Testimony of Andrew Xitco, Jr.)

Q. At that time was your vessel going straight ahead?

A. It was a straight pull.

Q. It wasn't going from side to side?

A. No.

Q. All right. Then tell the court what happened after that. Oh, by the way, just a minute. While you were pulling there, did you observe the action of your bitt on your mast, before the wire snapped?

A. I just observed the action of the stays. I did not observe the action of the bitt. The crew members did.

Q. What did you observe about the stays?

A. Well, it made an awful commotion there. I thought it was ready to come down, but the thinking of this Ronnie Nordstrum, he let the lead go off the double block.

Q. Now, will you put the letters "RN" where Ronnie Nordstrum let go after the cable parted, and put an arrow where he let it go.

(The witness did as requested.)

Q. What happened after the cable parted then and the line from the double block paid out? Did you stop your [33] vessel from going straight ahead?

A. We stopped the vessel in time to get the other end of the double block.

Q. So that the line didn't completely play out through the double block?

A. Well, we got the other end of it. I mean to say it didn't run all through the double block. We got a chance to get ahold of it.

Q. Tell the court what happened then.

A. Then we backed up some more and got a little closer and told them to give us more wire, so that we had to pull more wire aboard the boat.

(Testimony of Andrew Xitco, Jr.)

Q. Now, tell the court what was the purpose of requesting from the Pioneer an additional length of wire.

A. Well, the longer the wire, you have a longer scope, and it takes—with a direct pull you have so much greater strain on it. If it is twice the length, you have that much more length to pull, and you have such a big scope in the wire by the time you got it to the tow-bitt.

Q. Now, when you testified you illustrated the scope as being a portion of a circle; is that right?

A. Yes; where, if you have a short piece of wire, it would be a straight line. And if they give you more wire, it forms a scope and there is a lot of spring before it begins to pull. [34]

Q. Now, after you got the additional cable, what did you do?

A. Well, the boys—we fastened it onto the bitt, and then we rigged the double block and put that chain in practically the same position, and we started asking them for more wire and started pulling. Then we went on, and in the meantime we rigged, we turned 10 to 15 degrees to starboard and then to port, keeping the boat going this way and then that way, the same as a crow-bar, so that we could wheel her out. We started pulling that way for 15 or 20 minutes and she finally come off.

Q. Now, this second time that you attempted to pull her off, did you at any time give her a direct pull, full speed ahead, like you have done before?

A. No, we were pulling more on an angle, and swinging it.

Q. All right. Will you step up to the board diagram, please, and using a lead pencil, will you illustrate to the court the positions of the North Queen as she swung

(Testimony of Andrew Xitco, Jr.)

from one side to the other, in working the Pioneer off of the rocks? In other words, draw the line of the North Queen as she went completely to the right and as she swung over to the left, and so on.

A. The swing would be from here to there (indicating).

Mr. Lande: Just a minute. May the record show that the witness has drawn the outline of two hulls, which I will [35] label "A" and "B."

Now, will you sketch in the cable that you had from "A" to the Pioneer, and from "B" to the Pioneer?

(The witness did as requested.)

Q. Now, tell the court how you worked your vessel from position "A" to position "B," and back again, back and forth.

A. Well, you turned the wheel to the starboard a little and drove her 10 or 15 degrees, and then turned it to the port and would go there 10 or 15 degrees, and not hold it in one place, and after going from full speed ahead she wiggled loose.

Q. Who was at the wheel?

A. I was at the wheel.

Q. You were handling the wheel yourself?

A. Yes.

Q. Do I understand, then, you turned your wheel to the port 10 or 15 degrees?

A. Well, no, turned the boat 10 or 15 degrees.

Q. Then after your boat went a ways to the port side—

A. To the port, yes.

Q. —then you would turn your wheel the other way?

A. To the starboard, to keep the boat going.

(Testimony of Andrew Xitco, Jr.)

Q. Swinging back and forth?

A. Back and forth. [36]

Q. Between positions "A" and "B"? A. Yes.

Q. Now, at no time was your vessel in a direct stationary position?

A. No, she was always moving.

Q. Could you feel the Pioneer give as you kept working on her?

A. Well, we felt her give when she—a little there until she come off all at once, practically.

Mr. Lande: Just take the stand there, please.

The Court: Did she come off gradually or did she come off suddenly and clear the obstruction?

The Witness: She come off gradually.

The Court: When you were at the wheel, could you discern that she was moving off the rocks?

The Witness: No, I couldn't until she started moving a little faster.

The Court: What made you pursue this zig-zag movement?

The Witness: Well, it is always easier to pull something off if you work it back and forth than with a straight pull, because maybe she went on that way or maybe this way. So, by trying both of them a few degrees one side or the other, you would have a better tendency to pull it off, you have better success that way.

Q. By Mr. Lande: After she came clear, then what [37] happened?

A. Then we pulled her out for about, I judge, around a quarter of a mile or so, and then we let the cable go, the wire off of our bitt and took the double block down; and they pulled the wire aboard and Joe asked over the

(Testimony of Andrew Xitco, Jr.)

transmitter if we would stand by until they found out if they could proceed on home. So we drifted around there, I would say around 45 minutes, somewhere around 45 minutes, and then he says he is going to inspect the engineroom and down in the fish hold and see if she was leaking water and see if he could proceed slowly to San Pedro, and he called back and said they were going to proceed on home, and we could leave.

Q. What did you do after the Pioneer left Laguna there?

A. Well, then I headed on towards Dana Point, and the moon came out and then we went down a little further, went down another 5 or 6 miles, and looked around, and come back to Dana Point and we drifted around there for a while.

The Court: Did you do any fishing at all?

The Witness: No.

Q. By Mr. Lande: Why not?

A. Well, the moon was up quite a ways. I think it come up around 9:00 o'clock, and that is a pretty big moon.

Q. So you lost the night's fishing? [38]

A. Yes, we lost that night's fishing.

The Court: What was the capacity of your catch that you had on there when you started this salvage movement?

The Witness: Oh, we just started out at night to fish during the dark of the moon.

The Court: Didn't you have any fish aboard?

The Witness: Well, the sun was just setting, and we started—you just fish during the dark of the moon. On the nights the moon is out you don't work as many hours.

(Testimony of Andrew Xitco, Jr.)

The Court: I know that. I wanted to know how much you had aboard that night.

The Witness: We didn't. It was 7:10 when this happened, and around 6:45, or, it was getting dark around 6:30.

Q. By Mr. Lande: In your opinion, Mr. Xitco, what could reasonably have been expected to happen to the Pioneer if she hadn't promptly been pulled off of the rocks and freed?

Mr. Verleger: Your Honor, I don't know if this witness is being asked to testify as an expert witness on the nature of the situation, the danger of it, or not. I think some foundation should be laid as to his experience with salvage operations of vessels and the like.

The Court: Yes. He has already testified as to the physical factors. Now, if you are wanting him to testify also as an expert, you should qualify him.

Mr. Lande: Not as a salvage expert, but during his long [39] years of experience as a fisherman what he has seen happen to these vessels and what he knows happens.

The Court: As long as the witness knows, he may testify to what he knows.

Q. By Mr. Lande: Will you tell the court what you know about fishing vessels being stranded on rocks and suffering damage from the tides and the ground swells and rocks, and so forth?

A. What I know we done is a very valuable thing.

Q. The court wants to know what experience you have had. In other words, have you seen such vessels?

A. It is not only that I have seen. I have been on the rocks.

(Testimony of Andrew Xitco, Jr.)

The Court: You have been on the sea, I think you said, since 1923, was it?

The Witness: No, since 1922. I came to Pedro then and fished tuna.

The Court: And you have been sailing the coast, have you?

The Witness: Well, up between here and Vancouver Island, and down to Mexico.

The Court: You are familiar, then, with the waters around here?

The Witness: Well, I have been on the water since 1909, with my father. [40]

The Court: You have been aboard ships during all the time?

The Witness: Yes. Well, I mean when I said 1909, when I was on my summer vacation, in salmon fishing going up to Puget Sound.

The Court: What type of qualifications do you have personally?

The Witness: I am licensed on all fishing vessels.

The Court: What kind of a license do you have?

The Witness: At that time I just had an inspector's license.

The Court: Go ahead.

Q. By Mr. Lande: Now, in your opinion, what could reasonably have been expected to happen to the Pioneer if she had not promptly been pulled off of the rocks and freed on the night you found her there?

A. If she wasn't pulled off and the tide was flooding, why, she would have a tendency to roll more and bounce more on the rocks below.

(Testimony of Andrew Xitco, Jr.)

Q. And what would be the effect of bouncing and rolling on the rocks?

A. It would puncture her sides and fill her with water. All she has is $2\frac{1}{4}$ and $2\frac{1}{2}$ -inch planking.

Q. Explain that to the court.

A. She would roll, and she weighs 50 tons, and her [41] planking would puncture on her. The planking is $2\frac{1}{2}$ or $2\frac{1}{4}$ inch.

Q. By planking, you mean the sides of the boat?

A. The sides of the boat.

Q. The planking on the sides?

A. Yes. And it is very important. If she would stay there a little longer, you couldn't tell, she might puncture right there through her bottom, and her bottom showed it wouldn't be long before she filled with water, just as a purse seiner we saw that went on at Point Arguello and the boats could have saved her, but the insurance company sent the tug and by the time she come back there, the owner lost the boat, a \$75,000 boat.

Mr. Verleger: Your Honor, this may not be necessary, but unless we know the specific circumstances it seems to me that other such incidents are not pertinent, in any event, at least until we know the circumstances, the type of boat and all the other matters.

The Court: Yes, I think that we would be getting into a realm of conjecture.

Q. By Mr. Lande: Were the circumstances of that stranding similar to the Pioneer being stranded down here, a little? A. Yes.

The Court: Do you know what the tides were at the [42] Arguello Point?

(Testimony of Andrew Xitco, Jr.)

The Witness: That Arguello Point, well, we passed there at the time, and that is three or four tides.

The Court: You passed by at the time of the disaster?

The Witness: We come by in the morning. It went on in the early part of the morning, and the salvaging tug was on its way up there. But I was on the rocks over at Clemente Island, on the leeward side of the island. We went on the rocks after the tide went out, and as the tide started flooding, we started rolling around and we had severe damage on our hull as we towed in.

The Court: Did you have that experience before the day of this incident?

The Witness: Yes, I did.

The Court: Very well. Proceed. Let's get along now.

Q. By Mr. Lande: Now, what effect, and I think you have answered some question, but there hasn't been anything put into evidence as to tide tables, but, Mr. Xitco, let's assume, which I think the evidence will show, that there was a rise in tide from the time you came up there around 7:00 o'clock up until about 12:00 midnight.

Mr. Verleger: Now, your Honor, if it would be convenient, we brought in the tide tables, and we might as well put them into evidence now so that we will know what we are talking about. [43]

The Court: I think so.

Mr. Lande: You can check me on this. The low tide on the 9th was at 5:32 P. M., 5:32 in the afternoon, low tide.

Mr. Verleger: We do not agree exactly, but the difference is small. My table shows that at 5:27 P. M. it was low tide at the outer harbor, and there is a little difference between the outer harbor and the nearest nautic

(Testimony of Andrew Xitco, Jr.)

point at Laguna, which is the outer dock at Balboa, and which will give you 5:17 P. M., but the difference is so slight I don't think it is worth talking about.

Mr. Lande: And high tide was at 12:08 the next morning, on the morning of the 10th.

Mr. Verleger: As to that, again I think the difference is slight. My table indicates 12:09 A. M. less 10 minutes, which would be 11:59 P. M. That is from the United States Coast Survey.

Mr. Lande: We figured it from San Diego up, and I think it is figured there from Los Angeles. Those are approximate times, at least. Around 5:30 in the evening and 12:00 o'clock midnight, which was the high tide.

Mr. Verleger: I think it would be helpful at the same time to get into the record the amount of the rise in tide to be expected. The Coast and Geodetic Survey table shows that at Outer Harbor in Los Angeles minus 1.3 tide was low and a plus 4.3 was high, which gives you a differential [44] of 5.6 feet. Their table also shows that there is no differential as to the height of the tides between the Balboa dock and the Outer Harbor, which should indicate the height of the tide should be the same there.

The Court: As to those figures, are they estimated on any particular season or any particular period?

Mr. Verleger: They are for that particular date. They are the regular tide tables, as published.

Mr. Lande: Those figures agree with what I have, your Honor, so that there is a 5.6 feet rise in tide from approximately 5:30 P. M. to midnight.

Q. By Mr. Lande: Now, assuming he went on at around 7:00 o'clock, that is, the Pioneer went on the

(Testimony of Andrew Xitco, Jr.)

rocks at around 7:00 o'clock, what effect would the rise in tide have upon the danger that the Pioneer was in?

A. Well, as the tide started flooding, she would be in more danger. As we found her, as she stopped, she was practically fastened to the ground, and as she keeps getting on more water she would start rolling and moving up and down, and as the tide kept flooding, it would be getting worse.

The Court: Would she be worse with a flooding tide than with a receding tide?

The Witness: Yes.

The Court: Why?

The Witness: Because when she come on she stopped, and [45] then as the water started coming in and kept rising, she would start floating a little, a part of the ship keeps rising.

The Court: Suppose the tide was receding, wouldn't it be the same?

The Witness: She wouldn't move at all. If she come on at high tide, in a matter of two or three hours she would be the same as lying aground,—

The Court: Proceed.

The Witness: —because she was fastened there.

Q. By Mr. Lande: What would have happened to the Pioneer if her holds had flooded?

A. She would fill up with water and then she couldn't proceed on home under her own power. They would have to have a salvage tug there, and as time goes on you don't know what is going to happen. Wind could come up or a storm come up and you wouldn't know what could happen.

(Testimony of Andrew Xitco, Jr.)

Q. Would her machinery be damaged?

A. Her machinery would be damaged.

Mr. Verleger: Your Honor, I think these are all conclusions and conjecture. I don't think it is necessary to go into what would happen. What we are dealing with is facts. I have no objection to any question of fact.

The Court: Certain of those factors are self-evident, of course, but I don't think we want to get into the realm [46] of conjecture.

Mr. Lande: What I wanted the witness to testify to is what would reasonably be expected to happen.

The Court: If there is a hole in the bottom of the ship and she is on the surface of the sea it is evident what is going to happen unless there is some further human instrumentality that intervenes itself.

Mr. Lande: Your Honor, I would like to read into the record at some time, as a basis for further questioning of Mr. Xitco, the answers to several of the libelant's interrogatories; or, to save time, may I introduce the entire questions and answers in the interrogatories in evidence?

Mr. Verleger: They are a part of the record anyway, aren't they?

The Court: I don't know whether they are a part of the record on the hearing. They are a part of the record, but whether they are a part of the record on the hearing on the merits is a debatable question. I think if there is no objection they will be made a part of the record and marked as exhibits in the case.

Mr. Lande: Thank you.

The Court: There being no objection, it is so ordered.

(Testimony of Andrew Xitco, Jr.)

The Clerk: Libelant's Interrogatories are marked Libelant's Exhibit 6 in evidence. [47]

(The document referred to was marked Libelant's Exhibit 6, and was received in evidence.)

The Court: I have read most of them, Mr. Lande, and I am familiar with them.

Mr. Verleger: And the answers?

Mr. Lande: May I ask the court, is the court familiar with the technical terms in the answer to the ninth interrogatory, about the keel, keel shoe, forefoot, and so forth?

The Court: Just a moment.

The Clerk: The answers to the interrogatories are marked Libelant's Exhibit 7 in evidence.

(The document referred to was marked Libelant's Exhibit 7, and was received in evidence.)

The Court: Some of the terms I am not familiar with. Most of them I am.

Q. By Mr. Lande: Will you explain, Mr. Xitco, what the keel shoe on a vessel such as the Pioneer consists of?

The Court: I think I know what the keel and the keel shoe is. The ones I do not understand are the "fathometer hull fitting blocks" and the "caulking in bottom butts and seams."

Q. By Mr. Lande: Will you explain those terms to the court, please?

The Court: Just a moment. I don't think there are any others. [48]

"Stuffing box," I think I know what that is, and "the screens on sea suction."

(Testimony of Andrew Xitco, Jr.)

Q. By Mr. Lande: Whereabouts are the sea suction on the Pioneer? Let me ask you a preliminary question. You have seen the sea suction? A. Yes.

Q. Have you seen the Pioneer on dry dock?

A. Yes.

Q. Describe in words where the sea suction on the Pioneer is located?

A. Most of these boats have—

Q. On the Pioneer?

A. Yes. The Pioneer has a couple sea cocks about 5 or 6 feet from the bottom of the keel up here; sea screens or sea cocks.

The Court: What are they made of?

The Witness: Bronze.

The Court: What was the keel of the disabled ship made of?

The Witness: Just ordinary pine.

The Court: The whole keel?

The Witness: Yes, or made of fir.

The Court: Talk louder.

The Witness: Fir or northern pine.

The Court: No metal at all? [49]

The Witness: No. There is iron bark at the bottom. That is on the shoe that they slide along and these fathometer fittings fit right in there where the planking starts fitting in.

The Court: What is that instrument?

The Witness: Well, they have a different one. They have maybe two of them. We have just one of them on this side. The fathometer fitting fits right above the keel there, right about from a corner there back about 30 feet.

The Court: Is that a measuring instrument which determines the depth?

(Testimony of Andrew Xitco, Jr.)

The Witness: The depth, yes.

The Court: It works automatically?

The Witness: All by electric.

Q. By Mr. Lande: How high above the keel are the sea suction locations?

A. Well, they are about 6 feet—5 or 6 feet from the bottom of the keel. It would be about 6 feet to reach them, to put your hand on the keel and to reach up there to the sea suction.

Mr. Verleger: Your Honor, as a matter of assistance I have some pictures of the Pioneer in dry dock. That might be a way of showing exactly where the sea suction locations are, rather than this explanation.

Mr. Lande: We would appreciate the use of them. [50]

The Court: What is the function of those sea suction locations?

The Witness: Well, you have to have water to cool your engine off, and all your different pumps, you have three or four big pumps and auxiliaries, and your heavy engine. He has—I think they have fresh water coolers, but for their pumps, that is what you suck your sea water into, and to wash your decks down, and everything.

The Court: You think she received her supply of water for these pumps through the sea suction?

The Witness: Yes, whatever there is used on deck or in the engineroom comes through there.

Q. By Mr. Lande: I show you a photograph and ask you if you recognize that as the hull of the Pioneer.

A. Yes, that is the starboard bow. That is the starboard bow of the Pioneer.

Mr. Lande: May that be introduced as libellant's next in order, your Honor?

(Testimony of Andrew Xitco, Jr.)

The Court: So ordered.

The Clerk: So marked, as Libelant's Exhibit 8 in evidence.

(The photograph referred to was marked Libelant's Exhibit 8, and was received in evidence.)

Mr. Lande: Will you take my pen, please, and mark the different objects that appear on that photograph, when the court is through with it? [51]

Have you any objection to that?

Mr. Verleger: I would rather it would not be marked up too much. I want to use it later on myself.

The Court: What is this plate that is discernible on this exhibit? What is the number again, Mr. Clerk?

The Clerk: Exhibit 8.

The Court: I mean this plate indicated here (indicating).

The Witness: The chief would know more about the plate. That must be for the radio, the ground. That was for ours; we have one there for a ground.

The Court: Then you don't know.

Q. By Mr. Lande: What are the other objects shown there? For instance, the bubble right there (indicating)?

A. That is a fathometer, that is, the part down there (indicating). The others up there are the sea cocks.

Mr. Lande: May I mark this very carefully, Mr. Verleger?

Mr. Verleger: Certainly.

Q. By Mr. Lande: Will you show us the sea cocks, please? A. These are the sea cocks here.

Q. These two here? A. There is three.

The Court: He is marking up your picture, Mr. Verleger.

(Testimony of Andrew Xitco, Jr.)

Mr. Verleger: As long as he doesn't mark it up too [52] large I don't care. I am not sure my witness may have the same names for all of it. If you have any further markings, would you mind making it by letter?

Mr. Lande: I have the words "Sea cocks" there, and three lines there.

Q. By Mr. Lande: Are those sea cocks—does that mean the same as—

Mr. Verleger: I think, counsel, that it is hardly feasible for Mr. Xitco to answer whether the sea cocks referred to mean the same as referred to in Libellant's Interrogatories.

Mr. Lande: Let me finish the question.

Q. By Mr. Lande: Are those sea cocks the same as screens or sea suction?

A. Those are the screens for the sea cocks.

Q. What is shown there is the screens for the sea cocks?
A. Yes.

Q. What is your estimate of the distance between those sea cocks and the bottom of the keel?

A. That is about 6 feet, from here to the top one.

Q. Indicating from the bottom of the keel?

A. Yes, from the bottom of the keel here (indicating) to there.

Q. To the sea cocks as being 6 feet? [53]

A. To the sea cock strainers.

Q. To the sea cock strainers. Now, what would the fact that the sea cock strainers had been damaged or disturbed, what would that indicate to you as to the nature of the position of the Pioneer on the rocks?

(Testimony of Andrew Xitco, Jr.)

Mr. Verleger: Your Honor, I think the facts speak for themselves. I don't want to be technical, but I don't think the witness' opinion can help us very much.

Mr. Lande: It may be a matter of common knowledge.

Mr. Verleger: The fact is that they were disturbed or damaged. The exact nature of that I think will be shown later and the court, I think, is entitled to draw its own inferences from the evidence, and I don't think it will help us very much to have people tell us what they think it meant.

The Court: Are these the apertures you describe as being the openings through which the sea water got into the various parts of the ship that needed cooling or washing or cleaning?

The Witness: Yes.

The Court: I think it is self-explanatory. Did I understand you to say that the sea water that comes through those apertures was used to cool the engine?

The Witness: Well, they are used for different things, for the pumps, the engine—

The Court: No, I am asking you a direct question. [54] Please answer it, if you can.

The Witness: Yes.

The Court: Read the question, please.

(The question was read.)

The Witness: With the cooling system.

Q. By Mr. Lande: Of the engine?

A. Of the engine.

Q. Where is the rudder stuffing box on the Pioneer?

A. Well, they have an inboard and outboard—

Q. Tell us where the outboard one is.

A. Well, this is the stern bearing (indicating).

(Testimony of Andrew Xitco, Jr.)

Q. Referring—

A. Where it fits in this here this right here (indicating), that is the stern bearing. That is a stern bearing, and the inboard bearing of the tail shaft inside the hull you can't see. There are two bearings that hold the tail shaft, the inboard bearing and the outboard bearing, and most of them have more babbitt, but lots of them haven't.

Q. You have shown us the stern bearing and stuffing box? A. Yes.

Q. I asked you where the rudder stuffing box is.

A. Well, the rudder stuffing box is up at the top of the boat. They have a flange—you mean the rudder stuffing box? [55]

Q. Yes.

A. You couldn't see it there, because we have, and the rest of them have it inside there. There is a flange, and backing around, this is a rudder box here to keep the water from coming in through the fish hold of the stern.

Q. And where is the quadrant located?

A. Well, I don't know where theirs is located. Some have it above the deck and some below.

Mr. Lande: You may cross-examine.

Cross-Examination

By Mr. Verleger:

Q. Mr. Xitco, referring to Libelant's Exhibit 3, and referring to the boom as shown on Libelant's Exhibit 3, in what manner was the boom held to the mast?

A. The boom was held to the mast with four leads, 3½-inch Manila rope.

Q. Four leads. A. Four leads.

(Testimony of Andrew Xitco, Jr.)

Q. Do those leads all come at the same point?

A. On the mast?

Q. On the mast. Will you step down to Libelant's Exhibit 3 and indicate by marking with the letter "A" where the supports from the mast to the boom are connected to the mast?

The Court: Stand over to one side, so I can see you. [56]

The Witness: That is the double block. That is hooked—I can't draw it, but we have a big inch and a quarter loop that fits on there, and there is a shackle on the double block that slides back and forth.

Q. By Mr. Verleger: Will you put the letter "A" there? A. Yes.

Q. Will you show where it is fastened to the boom?

A. Well, there is a block here (indicating), and there is a block here.

Q. Mr. Xitco, are those the sole supports—

A. Well, the grounds.

Q. For the boom?

A. For the boom, outside of the stays, they keep it from whipping from one side to the other.

Q. Are there any lines that connect the mast to the boom from a lower point on the mast? A. No.

Q. I think you can take the stand again, Mr. Xitco. Do you use these lines to raise and lower the boom when you wish to do so?

A. On that exhibit A there, yes.

Q. Yes.

A. There is two more lines—I didn't complete it, but there are two more lines that go across there farther down where I put the little block. [57]

(Testimony of Andrew Xitco, Jr.)

Q. Will you step down and indicate where those lines are?

A. Yes. I thought you just wanted a rough outline. This is a double block. These are two single blocks, and this line comes down here and is tied on here.

Q. So you have four $3\frac{1}{2}$ inch lines holding the boom to the mast? A. Yes.

Q. In what manner is the mast itself braced?

A. Well, we have an inch or a $\frac{7}{8}$ -inch wire here for the stay, the forward stay.

Q. Let me interrupt. You say you have a $1\frac{1}{2}$ -inch wire—

A. No, one-inch or $\frac{7}{8}$ -inch. I didn't measure it.

Q. You have an inch or a $\frac{7}{8}$ -inch steel wire—

A. Yes.

Q. —running from the mast?

A. From the mast here to the stem, the stem iron on the boat.

Q. Will you mark that line with the letter "C"?

A. Which line? This (indicating)?

Q. Yes.

A. (The witness did as requested.)

Q. Is the mast also braced so as to prevent it from moving crosswise on the ship? [58] A. Yes, it is.

Q. All right. You can step back to the stand, Mr. Xitco. Would it not have been possible, Mr. Xitco, to avoid the risk of strain to the rigging of the North Queen in the event the line from the Pioneer to the North Queen should break by lowering this boom somewhat and by securing the line from the boom to the line from the Pioneer by a loop or by some form of connection which would slide along this cable from the Pioneer?

A. So it would slide back and forth?

(Testimony of Andrew Xitco, Jr.)

Q. Yes. A. You could do it, yes.

Q. Would that not eliminate the risk of damage to the rigging of the Pioneer, in the event that the line—will you strike that, please?

Would that not eliminate the danger of damage to the rigging of the North Queen should the line from the Pioneer break?

A. I mean to say it could be done, but it would not be practical.

Q. That is not the question, Mr. Xitco.

Mr. Lande: I think the witness is entitled to answer the question, your Honor, and also to state his reasons.

The Witness: I say it could be done.

Q. By Mr. Verleger: I say, would that not eliminate [59] that risk?

A. And you could leave it on the turntable, and you could run it through the hawser holes, but the most practical way and the safest way is the way we had it.

Q. The immediate question is whether, if you had a connection that would slide in the manner I have described, would that not eliminate the danger of damage to the rigging of the North Queen if the line from the Pioneer broke?

A. Well, I never rigged it that way, and I wouldn't know.

Q. Mr. Xitco, does the Pioneer have an eye through which it would be possible to lead a cable on the bulwark of the North Queen forward of the turntable and the net? A. Yes.

Q. Would it have been possible to bring a line from the Pioneer through that eye?

A. You wouldn't have the control of your ship then.

(Testimony of Andrew Xitco, Jr.)

Q. It would have been possible, then?

A. You can do it, but you wouldn't have no control over your boat.

Q. Do you remember, Mr. Xitco, whether at any time during the time you were pulling against the Pioneer that a vessel by the name of—that another fishing boat was in your immediate neighborhood standing by?

A. As we were pulling,—well, after they heard that [60] radio conversation, there was another boat come around there, I think after we parted the line the first time.

Q. After you parted the line the first time and before you commenced pulling on the line the second time another fishing boat appeared on the scene?

A. Yes.

The Court: May I interpose there? You say after you parted the line the first time. Did the line break more than once?

The Witness: No. I just meant when it parted.

The Court: The second parting was when you let go and she went on her way?

The Witness: No, on the first straight pull, as I explained before, that is the time the wire broke.

The Court: Did it break more than once?

The Witness: The second time it didn't break. That is the time she come off.

The Court: Yes.

Q. By Mr. Verleger: Can you step forward to the board here and on Libelant's Exhibit 2 show the approximate position in which the other fishing boat was standing by?

A. Well, I didn't see them. They were out here farther.

(Testimony of Andrew Xitco, Jr.)

Q. They were—

A. They were just maneuvering around.

Q. They were standing by off to the west of the North [61] Queen; is that correct?

A. Well, I didn't pay much attention to them. All I saw was a deck light, and I didn't pay much attention. I wasn't looking there at the time.

Q. I think you can get back on the stand, Mr. Xitco. Do you know whether they were off your bow or off—well, do you know whether they were off your bow?

A. Yes, they must have been off the bow.

Q. Do you have any idea how far away they were?

A. I wouldn't know.

Q. Do you know whether they made any offer to assist the Pioneer?

A. Well, I didn't hear the transmission always over the radio. It was Joe that was talking to Vincent Pakusich. They were on the radio, and I was on top at the wheel.

Q. Then the answer to the question is "No"?

A. No.

Q. Did you see the Pioneer commence to take a line to this other fish boat?

A. The Pioneer did not take no lines to the other fishing boat. They talked with us, and we got the line.

Q. Yes, but after the line broke, and while you were preparing to pull a second time, is it not true that steps were commenced to take a line from the Pioneer to the other boat? [62]

A. I didn't notice that while we were working down there.

(Testimony of Andrew Xitco, Jr.)

Q. Approximately what time was it when you first got the message of the Pioneer and came to her assistance?

A. Around 7:10 P. M.

Q. Approximately what time were you completed with the entire operation?

A. Around a quarter to nine, or somewhere around 9:00 o'clock, or 8:30.

Q. Did you have any occasion to notice, or, did you notice how far out of the water the bow of the Pioneer was when you commenced to pull her off after you had refastened the line, then, after it had broken?

A. Yes, you could see by putting the spot light on it, which we did two or three times, the search light.

Q. About how far up was the water line?

A. It was 4 to 5 feet.

Q. It was 4 to 5 feet at the time you commenced to pull a second time? A. I judge about that.

Q. And it was 4 to 5 feet, about, at the time you first commenced to pull it off?

A. It was a matter of 4 to 5 feet at the time we were around there. That is my judgment.

Q. You mean it remained 4 to 5 feet throughout the time [63] you were there?

A. It appeared to me it was about 4 to 5 feet as I put the light on, the first time I come in and put the light on, and then I turned the boat around. Then we were at a farther distance from them. Then as we pulled the second time, we were headed out.

Q. And your best recollection is that the bow of the Pioneer was about 4 to 5 feet out of the water when you commenced to pull the second time?

A. Around that.

(Testimony of Andrew Xitco, Jr.)

Q. Mr. Xitco, you have spoken concerning the nature of the bottom where the Pioneer was aground. Do you have any knowledge of the nature of that bottom?

Mr. Lande: I couldn't hear that question.

Mr. Verleger: The question I asked—well, perhaps the reporter had better read the question.

(The question was read.)

The Witness: According to the information that I get off the charts. I didn't survey the bottom.

Mr. Verleger: I think that is all for the present, your Honor.

The Court: Mr. Xitco, do you think there was any real danger, in view of the fact that you were able to use the towline in the manner that you have described, of fouling your own vessel by reason of your acts in attempting to [64] rescue the disabled ship?

The Witness: I think that was the correct way to rig it up. The other way I am sure that you would slip—that as you turn she would slip this way and then the next time the strain would be—in other words, if everything was tied from this way on, and if you had a slip, she would swing over, she would kind of be slipping back and forth, and might pile down, and all the tendency would be to piling. We wasn't pulling from the boom. All this up there was to keep the wire from rubbing on the net, and so we could swing her around. Most of the strain was right at the bitt.

The Court: There wasn't much danger to fouling your ship?

The Witness: No, it couldn't foul because everything—as it happened, everything was O. K.

The Court: You mean it was free?

(Testimony of Andrew Xitco, Jr.)

The Witness: It was free. The boat is free to do everything. All right. Here you have a hawser and like he explained, then it would be around here, and you would have trouble holding it in place all the time. This is the way they have been doing it among the boats.

The Court: That is all.

Redirect Examination

By Mr. Lande:

Q. Mr. Xitco, one further question: Isn't it true [65] that when you are about to engage in a pulling operation, or, where you are about to engage on a difficult pulling operation, it is of the highest degree of importance to have everything as free as possible, against the possibility that something may break, and, particularly, against the possibility that the line may break?

A. Oh, you have got to have everything rigged up the right way.

Mr. Lande: That is all, your Honor.

The Court: You wouldn't say that the ship was rigged for salvage purposes, would you?

The Witness: No, it wasn't rigged for salvage purposes. It was rigged for fishing.

The Court: In other words, this was an emergency?

The Witness: Yes. No fishing boat is rigged for salvage.

The Court: Wait until I finish the question. In other words, you had to rig your ship as a salvor, according to the emergencies as they presented themselves to you?

The Witness: Yes.

The Court: That is all.

(Witness excused.)

Mr. Lande: Mr. Berry, please. [66]

MATT BERRY,

called as a witness by and on behalf of the libelant herein, having been first duly sworn, testified as follows:

Direct Examination

The Clerk: Will you take the stand, please, and state your name.

The Witness: Matt Berry, M-a-t-t B-e-r-r-y.

By Mr. Lande:

Q. Matt, you are going to have to keep your voice raised, so that we can hear you. What is your occupation, please? A. Fisherman.

Q. How long have you been engaged as a fisherman?

A. The major part of eighteen years.

Q. What other types of work have you done besides fishing? A. Salvage and on tugboats.

Q. When you were on fishing vessels, what type of vessels were you on?

A. About 95 per cent were purse seine vessels.

Q. Similar to the North Queen? A. Yes, sir.

Q. And the Pioneer? A. Yes, sir.

Q. For whom did you do salvage work? [67]

A. I worked in salvage for the United States Navy in World War II.

Q. And how long were you doing salvage work in the Navy? A. About two years.

Q. And whereabouts did you do salvage work?

A. I worked in the Leyte Gulf salvage operations, the Caroline Islands, New Guinea and the Solomons.

Q. And during those operations on what type of vessels were you working?

A. We worked on all vessels, all types, small craft from 50 gross tons up, and the average type of vessel

(Testimony of Matt Berry)

was from 100 to 300 gross tons. Some vessels were larger, up to 3,000 tons.

Q. The vessels from 100 to 300 gross tons, were they approximately the same size, although not the same type, as the fishing vessels involved here?

A. Yes, they ran from 100 feet to 200.

Q. Now, what type of salvage operations did you handle, and what did you do in the salvage operations?

A. I was the acting salvage officer in charge of operations.

Q. On your vessel?

A. In the salvage operations in Leyte Gulf the vessel I was on was senior salvage vessel in the Leyte Gulf operations, and I was acting salvage officer in charge of operations. [68]

Q. Can you give the court some idea of the number of ships you worked on during those two years?

A. I would say that we pulled off or helped pull off approximately 72 to 74 vessels.

Q. Were there any cases of vessels stranded on rocks?

A. Oh, yes. The formation of the islands is coral and there is a lot of reef around the atolls and most of our jobs were the detail of salvaging of vessels that were stranded on rocks.

Q. Now, have you got any citations or medals from the United States Navy for your work while you were in the Navy?

A. I have a letter of commendation for salvage operations, which was in the Leyte Gulf operation, and I have the Philippine Liberation Medal from the Leyte Gulf operations, and the regular campaign bars that come from battle in the Asiatic theater operations.

(Testimony of Matt Berry)

Q. Well, I mean any other commendation other than what you have told us, insofar as your salvage operations are concerned?

A. I think I had two commendations on salvage; one letter of commendation on salvage, and the Philippine Liberation Medal, which was achieved, as I said, during the Leyte Gulf operations.

Q. During the time you have been a fisherman, have you observed wrecks of fishing vessels or been on vessels when [69] they have been wrecked?

A. Yes, sir. I have been on one or two—two vessels that had hit the rocks and were stranded, and I have helped a number of times to pull vessels off that were stranded slightly, or in trouble; a number of times.

Q. Were you serving on the North Queen on January 9, 1947? A. I was.

Q. In what capacity? A. Deck fisherman.

Q. All right. When the North Queen came up to the Pioneer, describe to the court how the Pioneer looked to you, as you saw her stranded there?

A. The Pioneer was almost horizontal to the beach. I would say it was on a 15, 20 or possibly 25 degree diagonal to the beach, and it was possibly three-quarters of a mile off shore and lying on the rocks which was surrounded by kelp, with the bow, I would say, about three or four feet above water. We didn't come more than three or four hundred feet close to the vessel on account of the kelp and the rocks.

Q. What was the weather at the time?

A. The weather was good weather, with a moderate ground swell.

Q. And did you notice any motion to the North Queen—I mean, to the Pioneer? [70]

(Testimony of Matt Berry)

A. There was a slight rocking motion; I would say five to 10 degrees, on the surge of the ground swell.

Q. Whereabouts were you on the North Queen after that, after you came up to the Pioneer?

A. When we came up to the Pioneer, I was on the bridge discussing the situation with the master. He knew that I had been in salvage and called for me. In fact, he sent a man, one of the fishermen, to call me, he wanted to discuss the situation with me on the bridge. I was down in the galley. So he asked me if I would help supervise the operations on deck, inasmuch as I was supposed to have some experience in that type of work, and I said that I would. So until we came to the Pioneer I was up on the bridge with the master.

Q. All right. Then when you came to the Pioneer, where did you go?

A. As we came to the Pioneer, we noticed that they had a small skiff out with a number of men in it taking out a line—paying out a line to us. This line was attached to a wire rope from their vessel to ours. They brought—they rode the small skiff over off the bow of our vessel, and we took the end of the line from the bow, and upon my suggestion worked the Manila line down the starboard side aft around the rigging and to the aft deck. Thereupon we hauled in the Manila rope on the aft winch until we came to the wire rope. Then upon securing the end of the wire rope, and having enough slack, [71] we secured the wire rope to the bow of the North Queen, then aft.

Q. I will show you Libelant's Exhibit No. 3 and ask you if that correctly portrays the placement of the wire cable to the bow of the North Queen? A. It does.

(Testimony of Matt Berry)

Q. Then what did you do?

A. We rigged the double fall from the boom down to the wire with a chain sling similar to what is portrayed in that exhibit.

Q. And how did you attach that double block or fall to the cable you were going to use?

A. With the chain sling.

Q. Will you explain to the court why you used the chain sling than the other—

A. The chain will not slide on wire rope, whereas Manila rope will, and wire is not practical. It has a tendency to have a biting effect, on the wire chain against the wire, and cannot slide, and that is the only thing you can use on wire rope.

Q. What was the advantage, if any, in having the chain bite into the wire cable at that point and hold?

A. The express purpose of that double fall was to keep the wire up high and clear the net. Therefore, we would have maneuverability on the North Queen, so that we could tow the [72] Pioneer off of the rocks, or attempt to. Without that you have no maneuverability and your ship will go in only one direction.

Q. What was the position of your boom at that time?

A. The boom was top up to about 20 degrees from top.

Q. Explain to the court why you had it in that position in preference to any other position?

A. That position is the strongest position of the boom. The farther down you lower your boom, the weaker it is. That boom on the North Queen I believe runs about, if I may venture, runs around a four ton boom, three and a half to four ton boom.

(Testimony of Matt Berry)

Q. Would that be strong enough to take the pull strain if it were unsupported? A. No.

Q. Now, how was the first attempt made to free the Pioneer?

A. In the first attempt, we—by “we” I mean the North Queen—the master, myself and the crew discussed it and suggested that we try to tow the Pioneer off with a direct pull, assuming that it went on in one direction, that we would pull in the opposite direction and there might be a possibility that she would get off. But after we had started towing gradually, gradually building up our speed until we came to a maximum speed, maximum towing speed, the only thing that resulted was the parting of the wire between the chain [73] slip and the tow chain.

Q. Now, based on your experience, is a $\frac{5}{8}$ -inch wire cable of sufficient strength to stand a direct pull in a situation like you have described here?

A. I don't believe that the $\frac{5}{8}$ -inch wire is strong enough. A $\frac{5}{8}$ -inch wire, I am not quite sure, but I think it has a breaking strength of anywhere from 6 tons to 8 tons of breaking strength, and I don't think the $\frac{5}{8}$ -inch wire rope is strong enough to tow a vessel of approximately 200 gross tons off the rocks when she is high and dry.

Q. Mr. Xitco has placed an “X” where the cable parted on the first direct pull. Does that correctly portray the situation?

A. It followed close there. I would say a foot or two aft the bow.

(Testimony of Matt Berry)

Q. At the time she parted, describe to the court in detail, please, what happened to your rigging, and how it acted.

A. Well, the rigging took a violent jar. In fact, I jumped to the side and I thought for a minute the boom, mast and all were coming down. We just happened to be lucky that one of the crew members released the end of the double fall, and it paid out. In the meantime the master had slowed down the speed, stopped and reversed. And it was just fortunate the end of the double fall had twisted and fouled in the double [74] block. That is the reason we didn't lose the end of the wire rope. It was just an act of God in just the fouling of the double block.

Q. If you had not had a secure hold on the towing cable at the place where you attached the chain to the double block, you would have lost the wire to the Pioneer, would you not?

A. Oh, yes, the chain slip was the only thing that held the end of the wire.

Q. And that would have entailed considerable time in getting the line again?

A. We would have lost considerable time; possibly half an hour. I don't know how fast people could work. Well, at least 15 minutes or half an hour would have been lost in losing that wire and having to get the same wire chain, or another one, if it was available.

Q. Now, tell the court what happened next, after the cable parted at that time.

A. We got down and got more wire in and asked the Pioneer to pay out more wire rope, so that we could attempt to pull them off again.

(Testimony of Matt Berry)

Q. What was the purpose of asking for additional wire?

A. Well, the cant of your wire has a lot to do in determining your tow. If I may give an illustration, in ocean tows we usually use 350 fathom of two-inch to 2½-inch tow [75] to take a 10,000-ton pull, and that cant in your wire will go down as low as 100 feet below the surface, for that acts as a spring on the sea, and it makes it much easier to tow and much safer, with more wire used and more cant.

Q. Did the Pioneer give you additional wire?

A. She gave us additional wire. I would say another 75 fathom or approximately that.

Q. Then what happened?

A. We started towing again. I went up on the bridge with the master of the vessel, and we decided that inasmuch as we couldn't pull the vessel off with a direct pull of the 5/8-inch wire, we would attempt to pull her off by using a series of diagonal tows, and we started first to the right, and we got to a certain position of leverage, we would give it a full throttle, and then swing again to port and again give it the full throttle. We worked on the theory of a lift or bar, of squirming the vessel off the rocks. And after towing that way 10 or 15 minutes, I noticed it seems to slack the wire, which is a sign that the vessel had moved; and since the wire had slacked, I knew she had moved and I told the master I believed the vessel had moved. Then we started again on the next angle and the vessel seemed to give a lurch and came straight off.

(Testimony of Matt Berry)

Q. Had this technique of working it off at angles been used by you before in other salvage operations? [76]

A. I learned that by experiment in similar salvage operations. I learned that in the salvage of LSMs and LCTs, vessels that were stranded on the mud and on the coral beaches and we had difficulty numbers of times in taking those vessels off in amphibious operations. So we experimented with that theory, and that was the theory we used on the Pioneer. We found it very successful in the Philippines.

The Court: We will suspend now until 1:30, gentlemen, in order that we may finish on schedule. Be here at 1:30.

(Whereupon, at 12:05 o'clock p. m., a recess was taken until 1:30 o'clock p. m.) [77]

Los Angeles, California, Friday, October 31, 1947.

1:30 P. M.

The Court: All present. Proceed.

MATT BERRY,

called as a witness on behalf of the libelant, having been previously sworn, resumed the stand and testified further as follows:

Direct Examination (Continued)

By Mr. Lande:

Q. Mr. Berry, in your opinion, what danger could reasonably be expected to the Pioneer if she weren't promptly freed off the rocks that she was stranded on?

A. I believe that with the rise in the tide and the slight increase in buoyancy that the Pioneer would suffer

(Testimony of Matt Berry)

a greater damage to her hull, due to the position of the Pioneer on the rocks.

Q. What do you mean by "due to her position"?

A. Her position just almost horizontally to the beach, and due to the ground swell, the slight increase in the tide and the greater buoyancy, it would mean greater pounding against the rocks, and possibly could capsize, and the rocks just might puncture her hull in that type of vessel.

Then their nets are all in one piece, and if the ship ever capsizes or sinks, that net will go down and sink, as she has no chance to free herself, which has been proven before. [78]

Q. Was time an important element in freeing the Pioneer?

A. I believe that time was an important element in freeing her.

Q. Explain to the court why.

A. Well, the longer that vessel stayed on the rocks and the more pounding she did, the more danger she would sustain to her hull, and, therefore, time was an important element.

Q. From what you know of salvage vessels and the way they are rigged and equipped, in your opinion was there any danger to the North Queen in using its vessel and rigging to attempt to pull the Pioneer off?

A. Yes, I would say that there was danger.

Q. Explain to the court what that danger would be.

A. The Pioneer's—I mean the North Queen's boom and mast is not rigged for towing, not rigged for salvage or towing, and it is not customary to take and rig your block and take a horizontal pull from the bow aft and

(Testimony of Matt Berry)

to take your strain on your boom and mast. It places too much strain on the boom and mast, and if anything should part on that added strain there, the mast and boom possibly could come down, and if men are on the deck they are liable to get hurt, get killed or maimed, which has happened before on those vessels.

Mr. Lande: You may cross-examine. [79]

Cross-Examination

By Mr. Verleger:

Q. Mr. Berry, isn't it true that the North Queen has on several occasions been used for fairly long tows?

A. Which vessel was that? I didn't get that question.

Q. The North Queen.

A. At the time I was on the North Queen, which was a period of four or five months, the vessel was never used for towing purposes, while I was aboard, so I wouldn't know.

Q. Isn't it true that fairly recently she was used to tow a vessel from the waters of Mexico for quite a long haul?

A. I wasn't on the North Queen. I was on the boat Searose, and I don't know if the boat North Queen was used for towing or not.

Q. Isn't it true, Mr. Berry, that as the tide would rise about the Pioneer there would be more water under her, so that as she rose she would actually be in less danger of touching her sides against the rocks than she was when you first arrived there?

A. There would be the relationship of the buoyancy to the weight of the vessel, and if a person could actually figure the amount of displacement that she had in relation to the weight of the vessel and the buoyancy, and the

(Testimony of Matt Berry)

rock, it could easily be determined, but I haven't the figures here. If the vessel had enough buoyancy and the rise in tide was [80] great enough, she could float off, but with a 5-foot tide, which was there, and we came in possibly on a foot or a foot- and-a-half tide, I don't think you could float her without additional power. That is my personal opinion.

Q. You said that as the tide rose the danger of damage would be increased. Is that correct?

A. With the slight increase in buoyancy is my statement. I said with the rise in tide and the slight increase in buoyancy. If it increased 20 feet, such as the Alaskan tides, she would float off, but with a slight rise I don't think she would.

Q. The question is with a two foot rise in tide—

Mr. Lande: I am sorry, Mr. Verleger. Your back is to me and I can't hear the question very well. Would you mind standing over here a little?

Mr. Verleger: Not at all. I am sorry.

Q. By Mr. Verleger: A two foot rise in tide would have a tendency to increase the amount of water beneath the Pioneer, would it not? A. Two feet.

Q. With two feet more water under the Pioneer, in your opinion, is she as likely to touch rocks on either side as she rose?

A. I didn't see the rocks. I assumed there were rocks there. [81]

Q. Assuming there were rocks on each side of the Pioneer, which had not as yet caused any substantial damage to her sides, with her existing line of roll, and assuming you had a two foot rise in tide, isn't it less likely that she would have touched those rocks?

(Testimony of Matt Berry)

A. No, I assume it was more likely, because the Pioneer with a two-foot rise in tide is not getting any buoyancy; the buoyancy is already there, but she is not floating. If she was floating, she would get off the rocks. She was just lightening herself, but not floating. If you understand buoyancy, you are lightening the vessel, but the vessel is still on the spot.

Q. Your conclusion is based because you feel she would not rise appreciably? Is that your feeling, that she was up so high the extra rise in tide would still leave her sitting firmly on the bottom?

A. I said the vessel was rolling from side to side in my earlier testimony, and I believe the roll was from 5 to 10 degrees. With the rise in tide and the slight increase in buoyancy, the vessel is going to roll in a greater arc, and as she rolls in a greater arc she is going to do more damage to her hull because it was pounding on the rocks.

Q. If the rise in tide would have the effect of lifting the Pioneer, or any portion of her, free from the water, then the danger of her touching the rocks would be less great; [82] isn't that correct?

A. If they had a 12 or 15-foot tide. A tide occurs about four times a day. There are two rises and two falls of tide. Each rise and fall comes in approximately a 6-hour period, and I assume from that that there was a lapse of almost two hours from the low water to the increase in tide, and in the remaining three or four hours there wouldn't be enough rise in tide to justify my changing my opinion.

Q. If a two foot rise in tide would have the effect of lifting the Pioneer any distance in the water, it is

(Testimony of Matt Berry)

your opinion though, I take it, that would reduce the risk of at least that much?

A. Are you trying to get me to form an opinion?

Q. Yes.

A. If you asked me to form an opinion, as I told you, I said in the additional four hours in that rise in tide I didn't believe it would cause enough rise to float that vessel. I don't believe so.

Q. I have asked you to assume the rise in tide would have the effect to float the Pioneer to some degree, possibly not to free her entirely. In that event I think I am correct in saying that I understand your testimony to be that in that event the likelihood of the Pioneer touching the rocks would be reduced. Am I correct?

A. You mean touching the rocks and the rolling effect? [83]

Q. Touching the rocks on her sides, if there were any rocks on her sides, when she rolled?

A. She would touch the rocks more on a larger arc.

Q. But if she actually floated in some degree, the arc would not be increased; is that correct?

Mr. Lande: I object to the use of the word "floated." I don't know if he means increased buoyancy or floating free. I don't know just what Mr. Verleger has in mind.

Mr. Verleger: There is some portion of the Pioneer, according to the exhibit, which shows a good deal higher out of the water than her stern, and I think it is conceivable, even if it would not free her entirely, that it would float her in part. She might be caught somewhere and she would be lifted and there would be more water underneath her, and under those circumstances it seems to me she would be less likely to touch any rocks because she would be farther above them.

(Testimony of Matt Berry)

The Court: Wouldn't it depend upon the arc which she followed in her rolling?

Mr. Verleger: Yes. As I understand it, she was rolling 5 to 10 degrees. The witness has testified that if the tide rose and her buoyancy was still enough to lift her in any portion clear of the water, then the effect would be merely to increase the arc in which she rolled, because of an increase in her buoyancy. The point I want clear, and which I think follows from that, is that if she was floating in any degree [84] the effect would be not to increase the extent of her arc, but to increase the amount of distance between the vessel and any rocks that might be in the neighborhood. Possibly it is unnecessary to go further in that connection.

The Court: Wouldn't that be a matter of deduction, if those elements were present and the keel of the ship were raised out of the sea? With some knowledge as to the character and location of the rocks, wouldn't it be self-evident that she would be elevated?

Mr. Verleger: It seems so to me, sir, but I think the witness' testimony is that increased damage would occur as the tide rose, and that seems to be based on the assumption that the water would rise about the vessel but the vessel would remain nevertheless firmly situated on the rocks. I want to be very clear that is the assumption on which he gives his testimony.

The Witness: That is correct. I assume that because of the vessels that I worked on in salvage when they were left on the rocks and there was an increase in tide, and they would always sustain more damage than if they were pulled off immediately. That is what I base it on. I base my statement on past experience. That is the only thing I have to go by, is past experience in similar cases.

(Testimony of Matt Berry)

Q. By Mr. Verleger: But the immediate question, I think, was the probability of the sides of the Pioneer touching [85] rocks rather than the keel, which was already in contact with the rocks touching them?

A. That's right.

Q. And in order to have such contact you would have to have an increased roll, and, coincidentally, no substantial increase in the amount of water beneath the keel at any point on the part of the Pioneer, and I think I am correct in saying your testimony is based on the assumption that as the tide rose, there would be a rise in water about the Pioneer, but the keel of the Pioneer would not in any portion float above the rocks?

A. I didn't say that. I said with the rise in tide and the slight increase in buoyancy. I based all my statements on a slight increase, which was a very few feet. A vessel of that type draws approximately 9 to 10 feet of water. I don't know exactly what her draft was, and I assume the tide has risen two feet from the low water until the time we arrived. That is assuming the high water is not enough rise in tide to take care of anything but doing more damage to the vessel, with the increase in tide, and I base that on my experience.

Q. And if it was true that the remaining rise in tide, the rise in tide actually while the Pioneer was there, would be sufficient, and possibly for a brief period further, would be sufficient to float her off in whole or in part, then a [86] different conclusion would follow that in all probability the vessel would not be greatly damaged?

A. You said "if."

Q. Yes.

A. But it is not enough—there is not enough rise in tide to conclude that, in my opinion.

(Testimony of Matt Berry)

Q. But the only reason you say the increase in damage is probable is because you do not believe the rise in tide would be sufficient?

A. Correct. It is published in the United States Coast and Geodetic Survey book, and you can read it. It tells you the tide for that day would be a certain number of feet, and that book does not lie.

Q. That tells what the rise in tide is, but does not tell us what the effect of the rise in tide is going to be. If the boat was sufficiently out of the water that the rise was not sufficient, nothing follows, obviously, but if a little more rise would do it, it is possible she might have floated clear. I explain that merely because the single point I am after is this: that if the effect of a further rise in tide would be to lift the Pioneer clear, your assumption as to extra damage would not follow; is that correct?

A. I still stay with the first statement I made, that there was not a sufficient rise in tide left—

Q. Let me interrupt. [87]

Mr. Lande: Let the witness finish his answer.

Mr. Verleger: All right.

The Witness: If it doesn't pertain to the case, if it was a different circumstance and a different tide table, it would be a different story. I am only stating in the Pioneer case, and not another tide. It was only the tide that was there that evening. That is what the book tells me, and I can't change my statement.

Q. By Mr. Verleger: I think, Mr. Witness, you are still not answering.

A. You say things was different.

(Testimony of Matt Berry)

Q. You have to answer my question. I think I am correct in stating it is necessary to make these assumptions.

The Court: Proceed.

The Witness: I just can't state it differently. I don't understand what he is trying to drive at, sir.

Q. By Mr. Verleger: In your experience in salvaging vessels in the Pacific, was it common for you to attempt to pull a boat off a reef simply by the power of the propeller of the vessel pulling, or did you ordinarily cast anchors and use special machinery to try to take it off?

A. It depended on the situation and what orders I received.

Q. What rank did you hold at that time?

A. A Chief Warrant, a Commissioned Warrant Officer, File [88] No. 350531.

Q. Isn't it true, Mr. Berry, that a vessel pulling merely by the use of its own screw, without an anchor cast, against a ship that is fast aground does not ordinarily have power enough to take off a vessel without the assistance of a rise in tide?

A. In certain cases yes, and in certain cases no. It just depends on the case. Every case is different, and every grounding is different.

Q. If a vessel is hard aground on a rock, and substantially out of water, isn't it true that it is very unusual, at least for a towing vessel, to have sufficient power to take that vessel off?

A. Well, I believe in over 70 tow jobs we only resorted to that method three or four times, and we used this system.

(Testimony of Matt Berry)

Q. The greater portion of those ships were landing type boats, were they not?

A. We had up to 300-foot LSTs.

Q. And most of those boats had bottoms especially made to touch ground, and which would permit them to be removed easily?

A. A percentage of the ships were PCs and SCs, which have the same type of bottom as the purse seine. They have a rounded bottom identically the same as the screws use, the same [89] as the purse seine type.

Q. But a great majority of the vessels were flat-bottom boats that you were concerned with in your operations?

A. Seventy-five per cent of them were.

Q. Mr. Berry, in determining the position of the Pioneer against the shore line, were you actually able to see the shore line?

A. The lights from the shore and the breakers against the beach, yes. The highway was so close you could see the headlights from the automobiles, and you could see the beach.

Q. Where was the Pioneer with reference to the Laguna Hotel, or could you see that?

A. Well, I wasn't watching for the Laguna Hotel. I don't even know where the Laguna Hotel is.

Q. Did you, or, do you know the power of the North Queen?

A. 300 horse-power Atlas Imperial 320. It is 300, rated as 320, an every-day, ordinary Atlas.

Q. When you came forward and took the first strain of the Pioneer, prior to the time the line broke, am I

(Testimony of Matt Berry)

correct in saying you came forward slowly until the line was taut, and then came ahead with full power?

A. A gradual increase of power, yes, sir.

Q. At the time the line broke, you had substantially no way on ahead? [90]

A. "No way," I don't understand. At the time the line parted, could you clarify that "no way on ahead"? I think I know what you are driving at, but I am not sure.

Q. At the time the line parted, was the North Queen going forward?

A. Well, if it wasn't going forward, the line would not have parted.

Q. I don't mean—

A. That is a very funny question to ask.

The Court: She was trying to go forward?

The Witness: You wouldn't have parted the wire unless there was a strain on the wire.

Q. By Mr. Verleger: There is no doubt, Mr. Berry, that the wire wouldn't part unless there was a strain on it. The question is whether you were pulling with the line taut, in which event, of course, you would not necessarily be going forward, although you would be exerting a lot of force against the wire, or did it part at the moment the line became taut?

A. It parted as soon as it parted. As soon as it parted we noticed the parting, but during the excitement we will assume—we don't assume—I know the vessel was not going ahead, because if it was going ahead the Pioneer would have moved off the rocks and the line

(Testimony of Matt Berry)

would not have parted. That is like saying something can't be moved against something that can't be pulled, or something that can't be pulled—an [91] indestructible force against an immovable object. But that wasn't the case.

Mr. Verleger: That is all, Mr. Berry.

Q. By the Court: Mr. Berry, just a question or two. Were you there during the entire operation of the salvage? A. Yes, sir.

Q. From its commencement to its conclusion?

A. Yes, sir.

Q. Were there any other ships there that participated in the movement?

A. After the wire had parted in the first operation there was no other vessel there, but after we had secured the wire again on the second operation and were towing, another vessel arrived at the scene. It was on our starboard bow, I would say about 200 yards, or, 100 yards away from us. I think it was the fishing vessel Sunlight. In fact, I know it was because my brother was on that vessel. She came in close towards us, and it seemed that just before she had gotten in too close, I would say 100 yards or so, we had freed the Pioneer, and that was all. We released the end of our towing wire and hawser, and then I think I noticed the name of the vessel at that time. I didn't know which vessel it was until after we had freed the Pioneer, and then I noticed it was the Sunlight because my brother hollered to me from the other vessel. Then I noticed it was the Sunlight. She came there about three or [92] four minutes, maybe four minutes or so, before we freed the Pioneer. She was on our starboard bow, coming up the coast.

(Testimony of Matt Berry)

Q. You know where Dana Point is? A. Yes.

Q. Well, regardless of the points of the compass, and I don't know what they are there, but taking the coast towards San Diego, where was the ship in distress, the Pioneer, in relation to Dana Point?

A. It was more towards San Pedro, towards Los Angeles Harbor. Dana Point is further down, and Newport is farther up here, and the place was in between Dana Point and Newport.

Q. Then this Laguna Hotel is down the other way from Dana Point? A. Is it?

Q. Well, I think so.

A. Then that is what I assume. This place was above Dana Point.

The Court: That is all.

Mr. Lande: Step down, Mr. Berry.

(Witness excused.)

Mr. Lande: Captain Varnum, please. [93]

CAPTAIN MYRON VARNUM,

called as a witness by and on behalf of the libelant, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Be seated, please, and state your name.

The Witness: My name is Myron Varnum, M-y-r-o-n V-a-r-n-u-m.

By Mr. Lande:

Q. Capt. Varnum, what is your occupation, please?

A. Master mariner.

Q. Are you retired at present? A. That's right.

(Testimony of Captain Myron Varnum)

Q. Now, how long have you been a master mariner?

A. Fifty years.

Q. And what license do you hold?

A. Unlimited.

Q. When did you first receive your unlimited master's license, approximately?

A. Somewhere around 1910, I think.

Q. What type of vessels have you worked on since 1910?

A. Freight ships, tugboats, salvage vessels.

Q. Will you tell the court the experience you have had on salvage vessels? Tell the court what you had.

A. I have been on a salvage tug for 14 years, on one boat, and three years on another boat, for a company called [94] Merrick, Chapman & Scott.

Q. What type of company was that?

A. A salvage company, marine salvage.

Q. Are they considered one of the large ones in the United States?

A. They are.

Q. Perhaps the largest salvage outfit?

A. Well, in the United States.

Q. Where did you have your salvage experience with Merrick, Chapman & Scott?

A. In San Pedro, and also on the East Coast, and in Tampico, Mexico.

Q. What type of salvage operations were you engaged in?

A. Well, we had an assortment of all kinds of ships, large and small.

Q. You were working on vessels all the time?

A. Yes, sir.

Q. In what capacity did you serve on that salvage boat?

A. As master.

(Testimony of Captain Myron Varnum)

Q. Did you have any salvage experience other than with Merrick, Chapman & Scott? A. No.

Q. Did you have any salvage experience while you were operating a salvage boat for the Navy? [95]

A. This salvage boat I worked on for the Navy was owned by Merrick, Chapman & Scott.

Q. I see. Was it a Navy salvage boat?

A. It was a Navy mine ship that was converted.

Q. What was the name of that boat?

A. The first one was the Peacock and the second one was the Viking.

Q. Is the Viking in service now? A. Yes.

Q. Is she the salvage vessel in the San Pedro Harbor now? A. She is.

Q. Have you had salvage experience up and down the coast between Laguna Beach and San Pedro, and down the coast?

A. Yes, from San Francisco to Cape San Lucas.

Q. Have you had any experience with vessels known as purse seine fishing vessels? A. A few.

Q. Have you had any experience with vessels of like size and tonnage? A. Yes.

Q. Very many? A. Quite a few.

Q. Have you had any experience with vessels such as that that were grounded on the rocks, stranded? [96]

A. Yes.

Q. Captain, I will show you the tide tables.

Mr. Lande: We have stipulated to the tide tables, I think?

Mr. Verleger: That is right.

Q. By Mr. Lande: Now, Captain, I will give you a hypothetical question. I want you to assume that a

(Testimony of Captain Myron Varnum)

purse seine fishing vessel of 183 gross tons was sailing on the coast off Laguna Beach, California at about seven knots, and that at about 7:00 P. M. on January 9th, 1947, the vessel struck a rock ledge or shelf at a place anywhere between 150 yards and $\frac{3}{4}$ of a mile offshore and was stranded on the rocks, and that at the time of the stranding the vessel struck with such force and in such a manner that the bow was raised approximately 3 to 4 to 5 feet out of the water, and that the rest of the keel was resting on the rocks to its entire length; and assume that in the stranding the keel of the vessel was damaged in its entire length, that the keel shoe, the forefoot, the stem band, the forefoot sheathing, the fathometer hull fitting box, the caulking in bottom butts and seams, the rudder, the quadrant and steering gear, the rudder stuffing box, the propeller blades, tail shaft, stern bearing and stuffing box, and the screens on the sea suction were damaged; and assume that when stranded the position of the vessel was parallel to or 40 to 45 degrees off the shore- [97] line with its bow in towards the shoreline; and assume that on the day of the stranding the low tide was at 5:32 P. M. and the next high tide at 12:08 midnight, and that there was approximately a $5\frac{1}{2}$ -foot rise in tide from the low to the high tide; and assume that there were moderate ground swells at the time of the stranding and afterwards, and that after the stranding the vessel was rocking from side to side with the swells with about a 10-degree rocking, rocking with the swells and working on the rocks.

Now, Captain, assuming that to be the situation of the vessel when stranded on the rocks, in your opinion what

(Testimony of Captain Myron Varnum)

damage to the vessel could reasonably be expected to follow from the stranding?

A. If she was left on there she would pound her bottom out.

Q. I beg pardon?

A. If she were left on there, she would pound her bottom out.

Q. Will you explain to the court the reasons back of your statement, why you feel that way?

A. Well, if she was grounded on rock bottom, and she was rolling, there is nothing to prevent her from breaking her planks, and filling with water.

Mr. Verleger: Would the witness speak a little louder, please? [98]

The Witness: I said if you left her on there, on the rocks, and she was rocking on there, there was nothing to stop her from breaking her planks in and damaging her planks so that she would be a total loss if you did not take her off.

Q. By Mr. Lande: Now, under the facts I asked you to just assume, Captain, what would be the effect of a rise in tide, that is, the effect of a rise in tide on the danger to the vessel from 7:00 o'clock until midnight, high tide? Do you understand my question?

A. Yes. Of course, the tide—she would float with the tide if she wasn't damaged as yet, and if she floated, lifted, she would pound harder if the sea was making her rock. Of course, if she floated, she would pound harder until she flooded altogether.

Q. Now, assume, Captain, that she went on at about 6:30 and assume that aid came to her at 7:30, and assuming now that your low tide was from 5:30 and from 7:30

(Testimony of Captain Myron Varnum)

on, as the tide rose a matter of maybe three or four feet, explain, please, how that rise in tide would affect the pounding of the vessel and working of the keel on the rocks, and the working of the surf, and of the ground swells on the vessel.

A. Well, the tide is lifting the ship and gives her more buoyancy and so she pounds harder until she floats or pounds her bottom out and fills with water.

Q. In other words, there is that danger of one or the other [99] happening?

A. Oh, certainly.

The Court: Nothing else could happen, could it, Captain?

The Witness: That's all there is to it.

The Court: Either one or the other thing is the eventuality?

The Witness: Well, certainly.

Q. By Mr. Lande: Now, can you give the court an idea of the type of action the working of that hull and keel has on rocks, when it is lying parallel to the ground swells stranded on rocks, and is swaying back and forth and working on the rocks?

A. Well, I couldn't say, except by the rocking she would keep breaking in her keel and planks, whatever there was.

Q. Was time an important element in a situation like that, of the vessel I gave you in the hypothetical question?

A. Absolutely.

Q. Now, explain to the court what you mean by that. How much time, minutes or hours or what?

A. Well, I mean this, that he should get help as soon as he could, to get off the rocks, and, in the meantime,

(Testimony of Captain Myron Varnum)

if help weren't coming, he should do what he could to get her off himself. But that is the first thing they should do, to try to get the vessel clear, and I would blame him if he [100] didn't.

Q. In other words, in your opinion, Captain, could the master of that vessel, so stranded, with reasonable safety have waited for the high tide to float himself off?

A. Well, I wouldn't have waited. if I could have got help. Anyway, he wasn't sure he could get her off at all with the help he did have.

Q. In other words, in your opinion there would be no assurance that even high tide would float her off?

A. A lot of things can happen from the time he went on before he would have any means of pulling himself off with his anchors. He had no more propeller, he had broken his blades, and in the meantime, she is pounding and might not be fit to take off when he got his anchors out.

Q. Now, Captain, in this operation let's assume that a vessel came to the aid of the stranded vessel that I have just told you about in the hypothetical question, and that the vessel that came to the aid was a purse seine fishing vessel of approximately 175 tons, with the usual and customary rigging that a purse seine vessel has, and they used a $\frac{5}{8}$ -inch wire cable to pull this ship off, the stranded vessel off, and that they attached the cable to their bitts aft, and then used a line from the boom to the cable to hold it up off of their fishing nets. In your opinion, Captain, was the vessel who was coming to their aid subjecting its rigging [101] and men on the ship to danger in attempting to pull the vessel off of the stranding?

A. I should say they would be, yes, more or less.

(Testimony of Captain Myron Varnum)

Q. Explain to the court why?

A. Well, in the first place, they are not rigged up for towing and pulling that way, and by having to hold the towing wire over the net in the boat, they were putting a heavy strain on the boom, and with that kind of light rig might be carried away. You have to use your judgment in how hard you pulled.

Q. Captain, let's assume that the men that came to the aid of the vessel that I have told you to assume was stranded took a long length of $\frac{5}{8}$ wire cable, and worked and pulled on it, and that when he pulled on it he went from 5 to 10 degrees to one side, then pulled, and then swung his vessel and went 5 to 10 degrees to the other side and pulled on the stranded vessel from the other side, and so worked on it from opposite angles until she came free. In your opinion, as a salvage man, was the master and crew of that vessel exerting skill?

A. That is what is done generally, which is to try to loosen the vessel, to loosen her on her bed, so that she will come off, where a straight pull won't do it.

Mr. Lande: You may cross-examine. [102]

Cross-Examination

By Mr. Verleger:

Q. Captain, I would like you to assume that instead of stranding at 7:30, the Pioneer stranded at around 6:30, that low tide is at approximately 5:30, and that high tide was approximately at 12:00; that after she stranded the water line of the Pioneer was approximately one foot out of water at the bow, when she had been approximately even with the water line before she stranded. Do you think it is probable under those circumstances that the rise of tide, with a 5-foot rise of tide

(Testimony of Captain Myron Varnum)

anticipated, or nearly so, would ultimately lift the vessel free?

Mr. Lande: I object to that, to the 5-foot rise, if she went on at 6:30 and low tide was at 5:30.

Mr. Verleger: We will correct that and say a 5-foot rise in tide between 5:30 and 12:00 midnight.

Mr. Lande: And that she went on at 6:30.

Mr. Verleger: Correct.

The Witness: Now, what was it you asked me?

Mr. Verleger: Would you read the question back, please?

(The question was read.)

The Witness: I believe she would if she wasn't too badly damaged.

Q. By Mr. Verleger: You may also assume that the vessel remained on the strand from approximately 6:30 to [103] somewhere between 8:30 and 9:00 o'clock, that about 500 gallons of water stowed in the foreward part of the ship had been jettisoned, and that during that period while the keel had been crushed and pounded, she had sprung no leaks and was taking no water. Do you think under those circumstances it could be anticipated that she could come free in the near future, and in all probability so soon as to suffer little further damage?

Mr. Lande: I object to that on the ground that it assumes facts not in evidence and is improper cross-examination. These facts do not appear in evidence.

Mr. Verleger: If the court please, I am going to connect them up. Those facts will be in evidence, and it seems to me worth while, since the captain has been called as an expert, to know what his opinion is on the facts that may ultimately be established.

(Testimony of Captain Myron Varnum)

The Court: I don't think it is proper to call the captain as your expert unless you pay him for doing it.

Mr. Verleger: I didn't really wish to do that, your Honor. The point I did wish to make clear was that—

The Court: I think the features about taking water are not in evidence yet, these features you have incorporated in that question about the taking of water and about the jettisoning of water, and so forth. I think I will sustain the objection. It may be that you will want to call the captain [104] later as your witness after you have elicited sufficient supporting facts.

Q. By Mr. Verleger: Do you think, Captain, on the facts already placed before you, that the vessel was approximately one foot out of water at the bow, that she went on at approximately 6:30 and came off at approximately 8:30 or 9:00 o'clock, that low tide was at 5:30 and high tide at 12:00,—do you think she was probably nearly ready to come off, in any event?

Mr. Lande: Just a minute. I object to that, that that is not evidence and assumes facts not in evidence. It is not in evidence that it was one foot out of water, and the evidence is that it was anywhere from 3 to 5 feet out of water at the bow.

The Court: Captain, let me make an assumption with you, which probably will come within the facts as they have been elicited so far, without indicating any view on the weight of them at all. Have you heard the evidence in this case so far?

The Witness: I have tried to; I have some of it.

The Court: Assuming after this salvage operation that the disabled vessel made her way to San Pedro under her own power without any difficulty. What would

(Testimony of Captain Myron Varnum)

you say, then, about the imminency of her being destroyed by remaining on the rocks?

The Witness: Well, your Honor, it was the master's place [105] to get the ship off the rocks just as soon as he could, in any way that he could, and the insurance underwriters would uphold him in doing it. If he had left her there he wouldn't know what would happen, he wouldn't know how much damage was under her, she might have punctured herself at any time and be a total loss.

The Court: It is in evidence that he didn't leave her there.

The Witness: Yes.

The Court: And called to his assistance another ship,—

The Witness: That is right.

The Court: —and that ship claims the salvage. Assuming that the disabled vessel after the incident that caused her to become stranded upon the rocks was extricated from the rocks and made her way to her port without any further assistance herself after she had been released from the rocks, would you think that the damage that had ensued to her bottom was such that she couldn't have been raised by the tide had she remained on the rocks?

The Witness: Well, I couldn't estimate that because you don't know how much damage was done while the tide was rising. As it was rising, she was going to pound harder.

The Court: That is all.

Q. By Mr. Verleger: Captain, in your opinion, is it possible ordinarily for a vessel pulling with her screw only, [106] without an anchor down, without getting

(Testimony of Captain Myron Varnum)

any fall through her winches, and anything of that sort, to disengage a vessel that is hard aground with her bow 4 to 50 feet out of water, and without any further qualification?

The Court: You had better read that again. I don't know that I followed it.

(The question was read.)

The Witness: If you have got power enough, you can pull her off, or pull her all to pieces.

Mr. Lande: What was the answer?

(The answer was read.)

Q. By Mr. Verleger: Isn't it true as a general rule, though, as a salvage man, that pulling with simply the screw of the vessel is a relatively ineffective way of pulling against a vessel hard aground for the reason that your screw is quite apt to end up simply boring a hole in the water?

A. Well, I have pulled lots of them off that way myself.

Q. In your opinion, assuming a vessel of around 170 tons on the rocks along the full length of her keel, with her bow 3 to 5 feet out of water, when the vessel was only pulling against a $\frac{5}{8}$ -inch steel wire, do you think such a vessel pulling on such equipment can pull such a ship off the strand?

Mr. Lande: Just a minute. I object to that, your Honor, because it is asking him the very thing that was done here. [107] That is what was done.

Mr. Verleger: That question is highly important, your Honor, because it bears very definitely on the question, as I think in fact was the case, that the tide had lifted her to the point where the vessel was about ready to come off anyway. If a vessel can't pull off a

(Testimony of Captain Myron Varnum)

craft that is hard aground in the style the libelant suggested, then it is clear the vessel wasn't hard aground the way they suggested.

The Court: Overruled.

Mr. Verleger: Yes. It is important just to know the relative conclusion.

The Court: You may answer that, Captain.

Mr. Lande: Will you read the question to him again, please?

(The question was read.)

The Witness: I don't know.

Q. By Mr. Verleger: You don't know?

A. I don't know, because if she was hard aground like that, he couldn't pull her out with a $\frac{5}{8}$ -inch wire.

Q. Captain, in rigging a line for the purpose of pulling against a stranded vessel, isn't it regarded as being extremely important so to rig the line that it will clear without damaging the pulling vessel's rigging if the tow line happens to break?

A. From the evidence I have heard, this was rigged [108] clear. When the line parted and his falls fouled, he wasn't to be blamed for that.

Q. Your claim is that the rigging in this situation was satisfactory because the falls were so set that they could be released the minute the towing line broke? Is that it, Captain?

A. Well, that is safety.

Q. If, in fact, it was impossible or impractical—please strike that. If, in fact, it was not conveniently feasible by releasing the fall promptly to avoid damage to rigging when the towline broke, would you have thought some other precautions were required?

A. I don't know of any he could make.

(Testimony of Captain Myron Varnum)

Q. Captain, I show you Libelant's Exhibit 3. You are familiar with the way in which the line came down from the boom of the North Queen to the towline?

A. Yes.

Q. The testimony is that that fall was secured by a steel chain wrapped around the line. Wouldn't it have been possible to use a manner of securing that fall that would permit this line to slide free if it broke?

A. No, I wouldn't rig it that way. He rigged it right.

Q. Wouldn't it have been possible to rig it so it would?

A. Yes, but when it slides free you would let the hawser come down and tear the nets. He had to make that fall fasten [109] in a certain place. He put a chain stopper on it and done the proper thing.

Mr. Verleger: I think that is all, your Honor.

Mr. Lande: No further questions.

The Court: That is all, Captain.

(Witness excused.)

The Court: I think the court should reorient itself. I have been thinking about that question with reference to the Laguna Hotel. The Laguna Hotel is towards Newport Beach instead of towards Dana Point, as the court indicated. I think I misled Mr. Berry there.

We will take a recess for about 10 minutes, gentlemen.

(A short recess was taken.)

The Court: Proceed.

Mr. Lande: May I call Mr. Xitco, please?

The Court: What is it for?

Mr. Lande: To establish the value of the North Queen.

The Court: Yes. [110]

ANDREW XITCO, JR.,

recalled as a witness on behalf of the libelant, having been previously duly sworn, testified further as follows:

Direct Examination

By Mr. Lande:

Q. Mr. Xitco, you are one of the owners of the North Queen, are you not? A. Yes, I am.

Q. At the time of the salvage service on January 9th, what was the fair market value of the North Queen, in your opinion?

A. Around \$170,000, the gear and all.

Mr. Verleger: I didn't hear the answer.

(The answer was read.)

Mr. Lande: That is all.

Mr. Verleger: I have a question on cross-examination.

Cross-Examination

By Mr. Verleger:

Q. How long have you owned the North Queen?

A. Well, I have owned it since Christmas, last Christmas.

Q. Have you been buying or selling, or have you been in a position to know the prices for which fishing boats generally have sold in and about San Pedro?

A. I didn't quite understand that question.

Q. I will withdraw the question. Have you had any [111] connection with sales of fishing boats, other than the purchase of your own boat? A. I did.

Q. On many occasions?

A. Well, just prior to that boat I sold one to the Greece government; I mean to the UNRA.

(Testimony of Andrew Xitco, Jr.)

Q. You mean you sold your previous boat to the Greek government?

A. Yes, six months before that, or in March I sold it to them.

Q. Other than that you have had no experience with the purchase and sale of fishing boats? A. Yes.

Q. One further question that does not relate to this particular item, your Honor. Has the North Queen been used for towing purposes recently?

A. Not since I had it.

Q. Isn't it true, Mr. Xitco, that the Pioneer has been used to tow a vessel up from the waters of the Gulf of Mexico?

A. Yes, we did, from the gulf to Guaymas.

Q. So that your original statement that you haven't done any towing is not correct?

A. I mean for towing,—it is not in the towing business. We fish with it.

Q. But you have towed other fishing boats? [112]

A. The other boat was sinking and we had to tow it to port.

Q. And you have done that?

A. No, that is the only time in the Gulf that we did that. It was in June, this last June.

Q. It is not uncommon for fishing boats to tow one another when they need assistance?

Mr. Lande: That is objected to as incompetent.

The Witness: It isn't the custom to tow them.

Q. By Mr. Verleger: You say it isn't customary?

A. It isn't.

The Court: Well, if a ship is in distress and you are close to it you usually respond to the call, don't you, whether it is a fishing boat or any other type of vessel?

(Testimony of Andrew Xitco, Jr.)

The Witness: If they send an S.O.S., we will go to her aid. If you are near there, you would respond.

The Court: If the circumstances were such that you might be able to tow her, you wouldn't abandon the derelict, would you?

The Witness: Well, if you could tow her in any possible way, yes.

The Court: When was this other towing operation, from Guatemala, or up the West Coast? Was this after the incident with the Pioneer?

The Witness: Yes. [113]

Mr. Verleger: That is all, your Honor.

Mr. Lande: We will rest the libelant's case, your Honor, at this time.

The Court: Proceed.

Mr. Verleger: I am going to call Marion Joncich. In that connection I would like to state that I would like to use an interpreter because he speaks English with a great deal of difficulty.

The Court: I don't know who the interpreter is. Is he satisfactory to you, Mr. Lande?

Mr. Lande: This is the first I have heard of him, your Honor.

The Court: Who is the interpreter?

Mr. Verleger: The interpreter is Mr. Zaninovich, and I am willing to qualify him as being familiar with both languages. I would have liked to ask for the regular interpreter, but I didn't know the need for him until quite recently.

The Court: Do you know him?

Mr. Lande: No, but Mr. Xitco can understand the language too, so with the aid of both, I think we will get along.

The Court: So he can check the interpreter.

Mr. Verleger: Is it the practice for the interpreter in this court to take an oath?

The Court: Oh, yes. [114]

Mr. Verleger: Mr. Zaninovich, will you please stand to take the oath?

The Clerk: What language is he to interpret?

Mr. Verleger: The Jugoslavian.

The Clerk: Will you state your name, please?

The Interpreter: Joseph G. Zaninovich.

The Clerk: Now, the witness will stand with you and you will both be sworn.

CAPTAIN MARION JONCICH,

called as a witness on behalf of the respondent, having been first duly sworn, testified through the interpreter as follows:

Direct Examination

The Clerk: You may take the stand, be seated, and give us your name, please.

The Witness: Marion Joncich, M-a-r-i-o-n J-o-n-c-i-c-h.
By Mr. Verleger:

Q. Captain Joncich, will you state the time when the Pioneer stranded?

A. The Pioneer stranded at 6:30.

Q. At that time in what direction and from what port was the Pioneer going?

A. At 6:00 o'clock we were at Newport and started to go east. At 6:30 we hit the rock.

(Testimony of Captain Marion Joncich)

Mr. Verleger: Your Honor, I think I would like to take the witness in English. I think it will go faster, and while [115] his English is pretty poor, I think it will work.

The Court: I think that is desirable always, if you can do so. Mr. Interpreter, you may take a seat there, and we may call on you later.

(Thereupon the witness testified without the use of the interpreter.)

Q. By Mr. Verleger: What was the Pioneer doing when she stranded?

A. Well, we were going east; going east along the coast, look for fish.

Q. Approximately where did you strand?

A. Right outside of Laguna Beach.

Q. About how far off shore?

A. About three quarter of a mile from the shore.

Q. Do you know whether you stranded on—

Mr. Verleger: I don't exactly recollect the name of the rock there.

Mr. Lande: Two Point Rock.

Q. By Mr. Verleger: Do you know whether you stranded on Two Point Rock?

A. Yes. We know after.

Q. Well, do you know whether Two Point Rock was the place where you stranded?

A. After I look on the charts, yes, I see that.

Q. You believe that is the place where you stranded?

[116] A. Yes.

Q. At the time the Pioneer stranded, what was the condition of the weather?

A. It was nice and smooth, just a little ground swell.

(Testimony of Captain Marion Joncich)

Q. After the Pioneer stranded, was she pounding up against the rocks?

A. No, he never moved: just agoing this way about a foot, or something like this.

Q. She rocked a little?

A. Yes, she rolled like that.

Q. After the Pioneer stranded, what did you do next?

A. Well, when boat hit the rock, then I tried to back up, see. I back up three times, and then we can't get off. Then my engineer, Joe Mardesich, he come up and I told him to go call the boats on the radio, if we can get any help to pull us out.

Q. Did you take any steps to try and pull yourself off with your anchors?

A. Then Joe Mardesich going to call up some boats, and I told crew to bring skiff from the stern, to bring to the bow. We figure to put on the skiff, to go dumping outside, you know.

Q. Did you actually put the anchor in the skiff?

A. No. Joe Mardesich come back in about four or five minutes, and he told me that he got the boat.— [117]

Q. The Sunlight?

A. —Sunlight on the radio. Then we stopped with the anchor, you know.

Mr. Verleger: I don't wish, your Honor, to lead the witness any more than I have to, but occasionally—

Mr. Lande: I would rather they not lead him. I will have to object to it.

The Court: If it is clear,—it is clear so far to the court.

(Testimony of Captain Marion Joncich)

Q. By Mr. Verleger: After you got word that help was coming, what did you do?

A. Then I told Joe Mardesich to take some fresh water out, and a few pump out lower, and see if there was any water coming in.

Q. Did you take any steps for the arrival of the boat that was coming,—your boat?

A. When he told me the Sunlight come in, I told crew to put coil rope in the skiff, get prepared to give them a cable.

Q. How long was the coil rope you used?

A. The 125 fathom they got in the skiff, and another we got in the boat.

Q. You had 125 fathom in the skiff. Did you have any rope more than that?

A. There was 125 in the skiff, and there was 100 fathom [118] in the boat.

Q. What did the men in the skiff do with the rope?

A. When we see that boat come in, they start going out, you know, to give them a line.

Q. How much rope did they pay out, in meeting the boat that was coming to your assistance?

A. I figure about 225 fathom.

Q. Then what was done with that rope?

A. Well, after the North Queen come in before Sunlight, the crew take then, you know, the line to the boat. He got the line. They pull out cable on it.

Q. How close did the North Queen come to you?

A. Oh, like by the cable, I got the towline 220-250 fathom, and about 25 fathom left. I can guess by that better than anything else.

(Testimony of Captain Marion Joncich)

Q. Did the North Queen come any nearer to you than she was when she received the rope which your skiff took to her?

A. Well, after we put that line, the cable, in the bitt and that cable bust, he stop right away and he tie cable again. He back up a little bit, but we never slack any cable from the boat, because we have the slack 225 fathom.

Q. Is the closest he came to you about the amount of line that you had paid out to the North Queen?

A. I don't think was any closer than 200 fathom from us. [119]

Q. What was your connection, or what was your job on board the Pioneer?

A. I am the captain of the boat Pioneer in the winter and summer.

Q. How long have you been a fishing boat master?

A. Well, from 1928.

Q. In your experience, has it been common for fish boats of the size and type of the Pioneer and North Queen to tow one another?

Mr. Lande: I object to that, your Honor, as incompetent, irrelevant and immaterial. This isn't a tow job. This is a salvage and a pulling off of a strand.

Mr. Verleger: There has been testimony, your Honor, that these boats are not equipped for towing, and I think the frequency with which they tow bears upon the extraordinariness of the operation undertaken by the North Queen.

Mr. Lande: There was testimony of the salvage.

Mr. Verleger: There was testimony they were not equipped for towing.

Mr. Lande: And salvage.

(Testimony of Captain Marion Joncich)

Mr. Verleger: And a towing job of this sort or a salvage job of this sort is apparently like a tow job because it involves pulling on a line.

Mr. Lande: I think that is counsel's expert statement without any support in the evidence that this is merely a [120] towing job. The statement by him is that they just pull on a line. But I think the question is immaterial, as to the towing part.

The Court: We have had enough argument. The objection is overruled. Now, read the question.

(The question was read.)

The Witness: Well, I used to tow before somebody else. I do last year the Betsy Ross. I tow him. He was broke down, down in the bank, and I tow him to the beach, Catalina beach.

Q. By Mr. Verleger: Do other fishing boats frequently assist one another, by towing one another?

A. Oh, all the time we help one another, you know.

Q. Do other fish boats frequently assist one another by trying to pull one another off the strands?

A. All the time. That is the law.

Mr. Lande: I object to that, your Honor, and ask that it be stricken. I would like to call the court's attention to some law on that point. That very same question came up in a District Court case in Washington, and I think it was Judge Neterer who wrote the opinion. There was a question whether or not where a libel for salvage service was made, with the defense that it was a customary thing among the fishermen to aid each other, and the court did not receive evidence, the court said the custom relied upon, if it exists, is against public policy. [121]

(Testimony of Captain Marion Joncich)

The Court: We are not speaking of the question of obligation. We are speaking as to how it reflects itself upon the type of service rendered by the salvor.

Mr. Lande: If that is so, all the more reason that it would be inadmissible, because he is asking him about towing vessels that are free on the high seas, and here we have a vessel that is stranded on the rocks.

Mr. Verleger: I think as to that, if the reporter will read the last question I think you will find you misunderstood it.

The Court: I don't think there is any question about the relevancy. The objection is overruled. Read the question, please.

(The question was read.)

The Court: If you want to have stricken the part of the answer, "That is the law," why, that will go out.

Mr. Lande: I so move, your Honor.

Mr. Verleger: No objection, your Honor.

Q. By Mr. Verleger: While the North Queen was assisting the Pioneer, did any other vessel put in an appearance—I will strike that, your Honor.

While the North Queen was assisting the Pioneer, did any other boat come there?

A. Yes. Another boat, as I says a minute ago.

The Court: The Sunlight? [122]

The Witness: The Sunlight. He was right alongside of me, about 100 feet from the North Queen on the west side.

Q. By Mr. Verleger: Approximately how long after the North Queen commenced operations did the Sunlight arrive?

(Testimony of Captain Marion Joncich)

A. Well, he got the cable first time, and he tied to the bitt. The cable bust, then he fix it up again, you know, the cable. Then at the same time just that Sunlight come in.

Q. Did the Sunlight come in before the North Queen commenced pulling the second time?

A. No, I think he come in before he pull a second time. He was just tied up the cable, when he come in.

Q. Were any preparations being made at the time the Pioneer came off, to take a line to the Sunlight?

Mr. Lande: Objected to as incompetent, irrelevant and immaterial, as to what preparations were being made, or what was contemplated.

Mr. Verleger: I think the cases have spoken of the fact that other assistance was available is relevant. The fact that a line was taken, and the fact that another boat was ready with its power in trying to get the Pioneer off certainly goes as to whether the special strain, so great as to risk the North Queen, had to be taken.

Mr. Lande: The answer is that it was taken, and if another vessel did join in the salvage operation, they would [123] have to pay two vessels instead of one. So I can't see that it adds or detracts so far as the total of their obligations on the salvage are concerned.

The Court: The only way it throws any light on the inquiry is on the question as to the imminence of the peril and the degree of skill of the claiming vessel. Every feature that is present at the scene may throw some light upon that, so as to motivate the court in the exercise of its discretion as to what the measure of compensation should be. That is the reason that the case which you

(Testimony of Captain Marion Joncich)

cited in Washington is not applicable. It does not exonerate, it does not remove the obligation to pay the salvor, but it throws light upon the activities which the salvor is claiming, especially where he is claiming a large amount of salvage. Overruled. Read the question, please.

(The question was read.)

The Witness: When the North Queen tied up cable second time, then I told crew in the skiff to take another line from the boat to the Sunlight, in case the North Queen can't pull us out, that they can give another cable to him.

The Court: He did take another cable?

The Witness: We got them in the boat, another cable to give to him.

The Court: But did you give it to him?

The Witness: No. He just take rope. He put them in the [124] boat.

Q. By Mr. Verleger: Approximately how long did the North Queen pull against the Pioneer the second time before the Pioneer came off?

A. Oh, about four or five minutes, I think. That time he started going off. The cable bust and then he tied up, but the second time he started pull, he pull four or five minutes.

Q. Did the North Queen pull in one position, or swerve from side to side?

A. It was in the night, you know, and from 200 fathom away. I don't know how much he swing, but he used to do that before. I don't think he swing so much.

(Testimony of Captain Marion Joncich)

Q. When the Pioneer came free, were her engines in good running condition?

A. Yes. It was an easy run, everything O. K. Then when he pull us out about a quarter of a mile, he talked to Joe Mardesich, my engineer, and the telephone operator, he talked on the telephone to them. I said, "Tell them to stop, to let go cable." We then go to pull up our cable, and I going to maneuver with propeller and cable, if everything work. If everything work all right, I let them know.

Q. And did everything work all right?

A. Everything all right, and we proceed home, and he proceed fish. Then I looked exactly my time, and was maybe a [125] few minutes off, but was about 7:00 o'clock, five minutes after seven, on my clock.

Q. That was when?

A. When he was through with us.

Q. Was the Pioneer leaking when she got off?

A. No.

Q. Did the Pioneer get into San Pedro satisfactorily on her own power?

A. Yes, we come into San Pedro without any trouble.

Mr. Verleger: That is all, your Honor.

Cross-Examination

By Mr. Lande:

Q. Now, when the Betsy Ross was towed by you, Mr. Joncich, you received a salvage payment for towing that vessel, didn't you?

A. Yes. I will tell you on that job we was—

Mr. Verleger: Your Honor, I object on the ground that this has no relevancy here. I don't mind seriously, but I don't see that it will help us any at the present time.

(Testimony of Captain Marion Joncich)

The Court: I suppose if he had assisted in salvaging he would be paid. Usually they ask that they be paid, if that is what you want to know.

Mr. Lande: I wanted it to be understood that it wasn't gratuitous.

Mr. Verleger: If there is any question about that, I [126] will stipulate that there is no salvage rendered by the fishing boats for nothing.

Q. By Mr. Lande: Aren't you a little mistaken as to the time you came free? Don't you mean 8:00 o'clock?

A. Yes, that is it. I am wrong on that. We come in at 6:30, and he come 7:00 o'clock to us.

Q. That is, the North Queen came to you about 7:00?

A. About 7:00 o'clock.

Q. And you got free at about 8:00?

A. Yes, 8:00. Excuse me.

Q. How soon after stranding did you send out your radio call for help?

A. Oh, about two minutes; after two or three minutes; right away.

Q. Now, if the call was received by the North Queen at 7:12, could you be mistaken that it was about 7:00 o'clock you went on the strand instead of 6:30?

A. 6:30 we going on the strand, and he come exactly 7:30 to us. And my clock maybe was wrong 5 or 10 minutes, but that is the most it can be.

The Court: You mean it only took him a half hour to complete the operation, from the time he came alongside until you came off?

The Witness: That's all.

Mr. Lande: I have no further questions, your Honor. [127]

Mr. Verleger: That is all, your Honor, of Mr. Joncich. I will ask the interpreter to stay for just a few minutes because there is one other witness we may need him for.

(Witness excused.)

Mr. Verleger: I will next ask Vincent Zuanich to come forward.

VINCENT ZUANICH,

called as a witness by and on behalf of the respondent, having been first duly sworn, was examined and testified as follows:

The Clerk: Take the stand, please, be seated, and state your name.

The Witness: Vincent Zuanich, Z-u-a-n-i-c-h.

Direct Examination

By Mr. Verleger:

Q. Mr. Zuanich, what is your connection with the Pioneer? A. I am deck man, skiff man.

Q. Where were you when the Pioneer stranded?

A. I am in the skiff.

Q. Where was the skiff? A. That is right.

Q. I say, where was the skiff.

The Court: Where was the skiff?

The Witness: On the stern of the boat.

Q. By Mr. Verleger: And where was the boat?

A. On the rock. [128]

Q. Did the Pioneer have the skiff on board or was it towing the skiff? A. Towing the skiff.

Q. So that the skiff was in the water at the time it struck? A. Was in the water, that's right.

(Testimony of Vincent Zuanich)

Q. What did you do with the skiff after the Pioneer struck?

A. When the Pioneer struck, the skipper called us—

The Court: If you will talk a little louder, please, so that everyone can hear you.

The Witness: When the Pioneer hit the rock, the skipper called crew of the skiff to the bow, get the anchor at the bow.

Q. By Mr. Verleger: Did you go forward to the bow of the Pioneer with the skiff? A. Close.

Q. When you were at the bow, did you see how far above the water level the water line of the Pioneer was?

A. Maybe one foot.

Q. Did you actually take the anchor— A. No.

Q. —of the Pioneer on board?

A. No. Skipper say better take rope.

The Court: I think we had better have the interpreter. [129] He speaks very clearly but he doesn't articulate so that we can get just what he means.

Q. By Mr. Verleger: Did you take the anchor in the skiff? A. No.

Q. What did you do with the skiff after that?

A. Skipper give us coil of rope in the boat and says to bring North Queen rope.

The Court: Will you read the answer, please?

(The answer was read.)

The Court: It will not be necessary to interpret it unless the reporter states she cannot understand it.

(Testimony of Vincent Zuanich)

Q. By Mr. Verleger: What did you do with the rope?

A. I had just one coil in the skiff, and he give us another coil for boat, to give so much slack, another coil.

Q. Did you take the rope out to meet the North Queen? A. That's right.

Q. Did you pay out most of the rope that you had on the skiff? A. That's right.

Q. How close did the North Queen come to the Pioneer while she was assisting the Pioneer?

A. Oh, maybe 200 feet. I mean 200 fathom close, pretty near.

The Court: How many feet do you mean? [130]

The Witness: In feet is 1500 or 1800.

Mr. Verleger: If it helps, your Honor, I believe a fathom is 6 feet.

The Court: I remember that, but I wanted to get his estimate, since he expressed it in both terms.

Q. By Mr. Verleger: While the Pioneer was being assisted by the North Queen, did another boat come to assist the Pioneer? A. The Sunlight.

Q. Did the Sunlight arrive before or after the time when the cable on the North Queen broke?

A. After.

Q. About how soon after?

A. Maybe—I can't say—maybe three or four minutes, five.

(Testimony of Vincent Zuanich)

Q. Did it arrive before the North Queen started to pull on its cable again? A. That's right.

Q. Did you make any arrangements to take a line from the Pioneer to this boat?

A. Yes, I gave a line to Sunlight, too.

The Court: Did the Sunlight take the line aboard?

The Witness: I take from Pioneer to Sunlight. I get the line from Pioneer, a two-inch line, I give it to Sunlight.

The Court: Well, did the Sunlight take the line? [131]

The Witness: Just take it. Somebody haul it. Then Pioneer came off. Threw the line, then somebody holler and say the Pioneer is off.

Mr. Verleger: That is all, your Honor.

The Court: Just a moment.

Cross-Examination

By Mr. Lande:

Q. When you pulled this 1200 feet of Manila rope out, it didn't float on the water as you went along, did it? A. Yes.

Q. Doesn't it sink and take a big bite?

A. No, sir.

Q. Your line floated out there?

A. Floated out on top of kelp.

Q. On top of the kelp? A. Yes, that's right.

Mr. Lande: That's all.

Mr. Verleger: That's all. Thank you.

(Witness excused.)

Mr. Verleger: The next witness is Paul Tipich. [132]

PAUL TIPICH,

called as a witness by and on behalf of the respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Take the stand, please, be seated, and state your name.

The Witness: My name is Paul Tipich, T-i-p-i-c-h.

By Mr. Verleger:

Q. When the Pioneer stranded, where were you, Mr. Tipich?

A. When the Pioneer stranded, I was in the skiff, in the big skiff.

Q. Did you go forward with Mr. Zuanich in the skiff?

A. Yes, I did.

Q. Did you see where the water line of the Pioneer was with relation to the surface of the water?

A. Yes, it was about a foot above water.

Q. Were you in the skiff when the Manila line was taken to the North Queen?

A. Yes, I was.

Q. How much line, approximately, did you have in the skiff?

A. Well, I would say we had about a coil of rope.

Q. Do you know how much that would be?

A. About 125 fathom. [133]

Q. How large a proportion of the rope did you pay out?

A. We paid out all the rope we had in the skiff, and then paid the rest from the boat.

Q. While the North Queen was assisting the Pioneer, did another vessel arrive for the assistance of the Pioneer?

A. Yes, sir.

(Testimony of Paul Tipich)

Mr. Lande: I object to that as calling for the conclusion of the witness.

Q. By Mr. Verleger: Well, did another vessel arrive?

A. The Sunlight arrived.

Q. Did you make any preparation for the taking of a line to the Sunlight?

A. We got a line from the Pioneer to the Sunlight with the small skiff.

Mr. Verleger: That is all, your Honor.

Mr. Lande: No questions.

The Court: Did the line reach the Sunlight?

The Witness: Yes. One of the fellows come in the big skiff, and he took the line from us.

The Court: I understand that, but did it actually reach the ship itself? Did it go aboard the ship?

The Witness: I believe it did. I believe he went up on the rail with it. [134]

Cross-Examination

By Mr. Lande:

Q. What type of line did you take over to the Sunlight? A. I would say about a two-inch line.

Q. That is a Manila line? A. Yes.

Q. And the circumference is two inches, not the diameter? A. The diameter is two inches.

The Court: The diameter of the rope is two inches?

The Witness: They call it a two-inch line. I really don't know.

Q. By Mr. Lande: Do you know the difference between diameter and circumference?

A. I know the difference between diameter and circumference, yes.

(Testimony of Paul Tipich)

Q. Was it two inches across, in diameter, or two inches in circumference? A. Well,—

The Court: That can be cleared up, I suppose, Mr. Lande.

Q. By Mr. Lande: Can you illustrate to the court about the size of it?

A. I tell you what it is. It is about the size of a cork line, and I would say it is about like that (indicating).

Q. Turn around so that the court can see you. [135]

The Court: Yes.

Mr. Lande: It is about two inches in circumference.

The Court: That was a Manila rope, was it?

The Witness: Yes, sir.

Q. By Mr. Lande: You don't know the tensile strength of that rope, do you? A. No, I don't.

Mr. Lande: How strong it was. All right, that is all.

Redirect Examination

By Mr. Verleger:

Q. I have a further question, Mr. Tipich. Pardon me. What was the purpose for which you took the Manila line to the Sunlight?

A. To take the topline, to take the cable out to the Sunlight. They would pull the Manila rope out—

Q. When the—

The Court: Just a minute. He hasn't finished.

The Witness: I was going to say that they would pull the rope if it would be necessary, and attach cable to it.

(Testimony of Paul Tipich)

Q. By Mr. Verleger: When you were in the skiff, did you observe whether the North Queen pulled straight on the second pull from the Pioneer, or whether they changed position and pulled from various angles?

A. To my estimation, I think he pulled straight.

Q. What was the position of the Sunlight with reference [136] to the North Queen?

A. I think he was west or northwest.

Q. About how far away?

A. Well, I really don't know how far away.

Mr. Verleger: That is all, your Honor.

Recross Examination

By Mr. Lande:

Q. On the second attempt the North Queen was considerably further from the Pioneer than on the first attempt, was it not? A. I didn't get that question.

The Court: Read the question, please.

(The question was read.)

A. Well, I don't know, because I was just going back to the Pioneer.

Q. By Mr. Lande: Well, as a matter of fact, you don't know the actions of the North Queen as it was pulling on the second time at all, then, do you? You weren't watching the North Queen the second time she was pulling, were you? A. I didn't say I did.

Q. Well, during the time of the second pull you were in the skiff alongside the Pioneer?

(Testimony of Paul Tipich)

A. At the second time, at the time of the second pull I was over at the Sunlight in the skiff, in the small skiff.

Q. And your attention was on the Sunlight? [137]

A. Well, we was talking to the fellows there.

Q. And you weren't watching the North Queen then, were you?

A. No, we weren't watching the North Queen. The fellows told us that they already had pulled the Pioneer off, and then they let go of the Manila line.

Q. So, as a matter of fact, you don't know how the North Queen was maneuvering in its second attempt to pull the Pioneer free?

A. I seen the first time she was pulling more or less straight, and I presumed the second time was about the same.

Q. That is just your assumption that you are giving us on that subject; is that right?

A. Well, I could see—what was that question again?

Q. As to the maneuverability of the North Queen on her second attempt, the second time she was trying to pull the Pioneer free, you didn't actually see the vessel and watch it, did you?

A. Well, I would say I did. Not all the time, but maybe just a glance. I wouldn't say I was watching it steady.

Mr. Lande: That is all.

Mr. Verleger: That is all.

(Witness excused.)

Mr. Verleger: I will call Joe Mardesich. [138]

JOE MARDESICH,

called as a witness by and on behalf of the respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Take the stand, please, and state your name clearly.

The Witness: My name is Joe Mardesich, M-a-r-d-e-s-i-c-h, and I am the engineer and part owner of the boat Pioneer.

The Clerk: Just be seated.

By Mr. Verleger:

Q. Mr. Mardesich, will you state—

Mr. Verleger: Is his statement as to his capacity in the record?

The Court: He said he was the engineer and part owner of the Pioneer. I think he said it after he was sworn, so we will consider it as a part of the evidence.

Q. By Mr. Verleger: Can you tell at approximately what time did the Pioneer strand?

A. I can only tell you what they told me because I didn't look at no watch or clock at the time.

Q. Strike the question, then. After the Pioneer stranded, what steps did you take to alight the ship?

A. I immediately released or disconnected the water piping on our fresh water tanks. We have two fresh water tanks, and each has a capacity of 800 gallons. [139]

Q. What is the consequence of releasing those parts or disconnecting them, as you say?

A. We have a valve on each tank, and I pulled out the body—I unscrewed the body of this valve to release this water.

(Testimony of Joe Mardesich)

Q. Then what happened to the water?

A. It empties into the bilge of the engineroom.

Q. What happened to it from there?

A. I had a pump going to pump it over the side.

Q. Were you making any preparations at the time the North Queen arrived in any other way to lighten the ship?

A. Yes, I was preparing to pump fuel overboard.

Q. Approximately how much fuel did the Pioneer have on board?

A. Oh, possibly 8 thousand gallons.

Q. Where was the water that you have mentioned stowed?

A. In the engineroom. It is considered forward because our engineroom is ahead of midship.

Q. Where is the fuel oil stowed?

A. The fuel oil was forward, extreme forward. Not all, though.

Q. Can you state how each part of it was stowed, then?

A. We have a tank forward and we also have tanks aft.

Q. How much of your fuel was stowed forward and how much aft, approximately? [140]

A. Out of the 8,000 gallons I think we had 5,000 aft and 3,000 forward.

Q. Did you observe the manner in which the North Queen pulled against the Pioneer when she pulled the second time?

A. You mean in relation to the North Queen?

(Testimony of Joe Mardesich)

Q. Strike the question. Did you observe the manner in which the North Queen pulled on its line in relation to the Pioneer the second time, that she took a strain on the line? A. No.

Mr. Verleger: I think that is all, Mr. Mardesich.

I would like, your Honor, to call Marion Joncich again, briefly, for one question on direct. Any objection?

Mr. Lande: Just a minute. I want to cross-examine.

Mr. Verleger: Surely.

Cross-Examination

By Mr. Lande:

Q. You told us you had 3,000 gallons of fuel oil forward and 5,000 aft. In order to pump that overboard you would have to put that through a line whose diameter was approximately how many inches or fractions of an inch?

A. I have a fuel transfer pump that is an inch and a quarter, a fuel transfer pump.

Q. That is your fuel transfer pump is an inch and a quarter?

A. And the lines are also an inch and a quarter. [141]

Q. Are your lines all the same?

A. Except on the very outlet they reduce down to one inch.

Q. So that in order to pump that overboard it eventually had to go through at about—

A. 1,000 gallons an hour.

(Testimony of Joe Mardesich)

Q. All right. Then it would have taken you 8 hours to have pumped it overboard?

A. 8,000 gallons will take 8 hours. I would not pump the stern oil. I wanted to pump the oil that was forward.

Q. And it would have taken you three hours to pump the forward oil? A. Yes.

Q. Then on your water line, how small a line did your water have to go through?

A. It was a three-quarter-inch line.

Q. How many gallons an hour could you pump through that? A. Gravity.

Q. That is strictly gravity? A. Yes.

Q. How would you get that out of your bilges then?

A. Oh, I pumped it out of the bilges, but it was gravity out of the tanks.

Q. How long would it take to drain the tanks?

A. They were full, and it was coming out pretty fast. [142]

Q. Well, in your judgment?

A. Well, the first hour would drain over half of it. Then it would take longer as the level got lower.

Q. About two and one-half hours would be a fair estimate?

A. To drain all of it, I guess, or a couple of hours.

Q. Then after you drained it you had to pump it out of your bilges?

A. I was doing that in the meantime continuously.

(Testimony of Joe Mardesich)

Q. But it would have taken two and one-half hours to get your water overboard?

A. To the last drop, yes, a couple hours.

Mr. Lande: Thank you. That is all.

Redirect Examination

By Mr. Verleger:

Q. One further question on direct. A. Of me?

Q. Yes. A. All right.

Q. Mr. Mardesich, how much of the water did you actually have overboard at the time the Pioneer came free?

A. Oh, from three to four hundred gallons.

Mr. Lande: I am sorry. I didn't get that.

(The answer was read.)

Q. By Mr. Verleger: Would it not have been possible for [143] you to pump fuel oil overboard in the same way as you pumped your water, that is, by breaking your connections and permitting it to run into bilges and pumping it out with your pumps there? A. Fuel?

Q. Yes.

A. Oh, it would take me a long time to break the connections.

Q. I see.

A. I suppose I would get it out faster with a pump.

Mr. Verleger: That is all.

(Witness excused.)

Mr. Verleger: Next I would like to call Captain Joncich for another question on direct.

CAPTAIN MARION JONCICH,

recalled as a witness on behalf of the respondent, having been previously sworn, testified further as follows:

Direct Examination

By Mr. Verleger:

Q. Captain Joncich, how far out of the water was the water line of the Pioneer at the bow before it stranded?

Mr. Lande: Just a minute. I object to that, your Honor, there being no foundation that the captain was in a position to see the water line at the bow. If he was, I don't object.

The Court: Will you read the question? [144]

(The question was read.)

The Court: How would he be placed in a position to see it?

Mr. Verleger: If that is the objection, sir, I will be glad to lay a foundation.

Q. By Mr. Verleger: Captain Joncich, do you know how far out of water the water line of the Pioneer was before it stranded?

A. Well, under fishing law we always see where we have copper line and I see in the pilot-house was maybe one foot.

Q. About one foot above the water line?

A. One foot over water.

Q. All you know in this case is your general practice—I will withdraw the question. Do you have any specific recollection as to how far out you were?

A. I don't know how much was at the bow. I was on the rock, and then I never looked outside. I don't know.

Mr. Verleger: That is all.

(Testimony of Captain Marion Joncich)

Cross-Examination

By Mr. Lande:

Q. Captain, when your boat was on the rocks, stranded, you could tell the bow was up in the air, couldn't you?

A. Yes, I could tell maybe a foot or two, but not six or seven. absolutely not, because I was on the ship.

Q. Well, would you say it was between three and five [145] feet?

A. If five feet I cannot stand up in the pilot-house. But I see in the pilot-house it was maybe one foot. I don't know how Mr. Xitco can say because he was maybe 250 fathoms away, and to say it was five feet, I don't know how he can.

Q. He had a searchlight on you, didn't he?

A. I never saw searchlight, no, that they spot us. Maybe I turn around in the pilot-house and not see, but I never see they spot us.

Q. Didn't he have the searchlight on you about three times? A. I don't remember that, absolutely not.

Q. But there was an inclination to your vessel, was there not? The bow of your vessel was raised after the stranding?

A. Yes, raised about a foot. But I don't want to say exactly. I know it was raised, something like a foot, a foot and a half.

Q. Now, when you went on the rocks you were moving and looking for fish at that time, were you not?

A. Yes.

(Testimony of Captain Marion Joncich)

Q. And doesn't your vessel go about nine knots an hour?

A. No. We overhaul when the full moon is. We was overhauled before we go fish, and we run slow for a couple of days, like that, and we go slow. We going about eight [146] knots, and regular speed is about ten.

Q. You were going about eight knots at that time?

A. Yes, at that time.

Q. At the time you hit you were going about that?

A. That is it, about eight.

Mr. Lande: That is all.

Mr. Verleger: That is all.

(Witness excused.)

Mr. Verleger: Next I would like to call Captain Fritz Scheibe.

CAPTAIN FRITZ A. SCHEIBE,

called as a witness by and on behalf of the respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Be seated, please, and state your name.

The Witness: Captain Fritz A. Scheibe, S-c-h-e-i-b-e.

By Mr. Verleger:

Q. Mr. Scheibe, have you ever made a survey of the North Queen for the purpose of determining its value?

A. I have.

Q. At what time? A. During April of 1947.

Q. And the value of the North Queen at that time would be substantially the same as her value as of January 9, 1947?

A. It would be substantially the same. [147]

(Testimony of Captain Fritz A. Scheibe)

Q. Mr. Scheibe, what is your occupation?

A. Marine surveyor.

Q. How long have you been practicing as a marine surveyor? A. Since 1927.

Q. What is your experience at sea?

A. Since 1912. From 1912 until I went surveying.

Q. What is the extent of your experience in valuing fishing vessels? A. Since 1927.

Q. Have you surveyed very many fishing vessels?

A. Very many. Approximately 50 per cent of the boats that fish out of Los Angeles Harbor.

Q. Will you state the extent of your experience in supervising the salvage of fishing vessels?

A. I have called salvage companies in to—salvage companies for the underwriters to salvage stranded vessels for the underwriters, or vessels in trouble. I have never supervised it myself.

Q. Have you participated with those companies in planning the operations and considering the operations to be followed out in the salvage of the vessels themselves? A. On occasions I have.

Q. When you surveyed the North Queen, what value did you place on her? [148]

Mr. Lande: I object. The question does not state whether fair market value, the value for replacement, or the value for insurance purposes.

The Court: Sustained.

Mr. Verleger: I will withdraw the question.

Q. By Mr. Verleger: At that time what did you figure the replacement value of the North Queen to be?

A. The replacement value at that time, to the best of my recollection, was approximately \$125,000.

(Testimony of Captain Fritz A. Scheibe)

Q. Is that the replacement value new?

A. That would be the replacement value new.

Q. In arriving at the fair market value at the time the actual survey was made, did you make any deduction from the replacement value?

A. I did not make a market value. I made a value for insurance purposes only.

Q. Do you believe that it is possible to place a fair market value at a given time on a vessel such as the North Queen?

A. I wouldn't attempt to put a market value on any fishing vessel. Market value is dependent on the amount of fish that is available to be caught and certain fishing conditions. When there is no fish, the value of the boats goes down, and when there is lots of fish the value of the boats go up; and also depending on how badly somebody else wants [149] the boat.

Q. Do fishing boats sell for constant market prices, or do the prices vary greatly from sale to sale?

A. The prices vary greatly.

Q. In your opinion, what is the only satisfactory way to place a valuation upon a fishing boat?

A. For insurance purposes, to calculate the replacement value. That would be the cost as of the time of the survey for a new boat of similar size and machinery, and from that the depreciated value is arrived at by deducting five per cent a year for every year of the vessel's life, and to that is added any renewals or additions that have been made.

Q. Is that depreciation based on experience as to the life of such boats?

A. It is.

(Testimony of Captain Fritz A. Scheibe)

Q. On that basis, what valuation would you place on the North Queen?

A. Approximately \$100,000.

Q. Mr. Scheibe, after the Pioneer was brought into port following her stranding, did you make a survey of the Pioneer? A. I did.

Q. Are you able to state without reference to the survey which you had made, the nature of the damage to the Pioneer? [150]

A. The metal stem band, the lower end of the stem band, was torn up. The forefoot was crushed. The entire hardwood shoe was missing. The keel was crushed from the forefoot to approximately within three feet of the stern proper. The fathometer blocks on each side of the keel were cracked. The propeller was damaged, and the strainers on the sea suction lines were broken.

Mr. Verleger: Your Honor, I have here, in addition to the pictures which have previously been offered of the bottom of the Pioneer, a number of other pictures of the Pioneer, which I wish to offer for identification for use by the captain in describing the nature of the damage.

Mr. Lande: It is understood that these are not pictures of the boat showing the damage to the boat.

Mr. Verleger: I think they will show—they do not show any damage. They are simply for use in illustrating the parts that were damaged.

Mr. Lande: In other words, these pictures were taken after the damage was repaired?

Mr. Verleger: That is quite right. As a matter of fact, they were taken quite recently.

The Court: Is there any objection to them?

Mr. Lande: No, your Honor.

(Testimony of Captain Fritz A. Scheibe)

The Court: They will be marked as such.

The Clerk: Marked as Respondent's Exhibits A, A-1 and A-2, [151] for identification.

(The photographs referred to were marked Respondent's Exhibits A, A-1 and A-2, for identification.)

Q. By Mr. Verleger: Captain Scheibe, taking these pictures, will you indicate as well as you can the line of damage to the hardwood keel? I am sorry. I will withdraw that.

First, will you show what the hardwood keel shoe is on these photographs?

A. That (indicating) is, that lower part on these pictures. That is approximately the three-inch hardwood strip that runs the full length of the keel. That is this piece right here.

Q. That strip is below the keel proper?

A. That is correct.

Q. Will you take this pen, Captain Scheibe, and draw a line and mark the end of it "1"?

A. The end of which?

Q. Will you take this pen and mark a line along the line of the hardwood keel shoe, and mark that line "A"?

(The witness did as requested.)

Mr. Verleger: Let the record show that the mark "A" referred to is made on Libellant's Exhibit No. 8, for identification.

Q. By Mr. Verleger: Will you show the line, as well [152] as you can, along which the keel was crushed and splintered?

A. I can't show the full length on these pictures because the keel doesn't extend—the picture does not extend the full length of the keel.

(Testimony of Captain Fritz A. Scheibe)

Q. Am I correct in stating that this damage is greatest at the bow and lesser at the stern of the vessel?

A. That is correct.

Q. How much of the keel, of the original piece of timber which formed the keel remained after the stranding?

A. I can only say how much was removed. I can't say how much was remaining because the keel extends above this first plank, and I don't know how thick that section was.

Q. Well, how much below the first plank?

A. It was removed within four inches of the first plank at amidships and forward. At the bow it was entirely removed for a distance of approximately six feet.

Q. The first plank that you refer to is the plank of the bottom that is immediately next to the keel; is that right?

A. That is correct.

Q. Will you show in these pictures where the forefoot of the Pioneer is?

A. Here (indicating).

Q. The forefoot is a piece of timber outside the hull of the vessel itself; is that correct? [153]

A. That is correct; also extends in behind the planking.

Q. Was the portion of the forefoot that extends in behind the planking damaged?

A. Yes.

Q. In what respect was it damaged?

A. It was crushed.

Q. Will you show where the fathometer hull fitting blocks are in these pictures?

A. There is one on each side.

Mr. Verleger: Will the record show that the fathometer hull fitting blocks are marked "B" on Libellant's Ex-

(Testimony of Captain Fritz A. Scheibe)

hibit 8, and that the forefoot is marked "C", and place an arrow to what you have referred to, on Libelant's Exhibit A-2, for identification.

Q. By Mr. Verleger: What damage did the ship bottom butts and seams show?

A. It showed several butts—cement in several butts cracked.

Q. Can you show approximately where those butts are on these pictures?

A. This picture shows the vessel painted recently and there are no butts visible. There are no butts visible in these pictures.

Q. What damage did the rudder of the Pioneer suffer [154]

A. The rudder was twisted and the bolts were slack, the through bolts, through the brads.

Q. Was there any indication on the rudder as to where it struck?

A. On the under side.

Q. Did the upper rudder shaft show any damage?

A. The upper rudder shaft was bent.

Q. To what do you attribute the damage to the upper rudder shaft?

A. The rudder being forced upward.

Q. Did the rudder stuffing box show any damage?

A. It was loose.

Q. Where is the rudder stuffing box?

A. The rudder stuffing box is inside the hull and cannot be seen on these photographs.

Q. Is it above the shaft from the rudder?

A. It is above the horn damper. The shaft of the rudder goes through the stuffing box.

Q. The horn damper is above the rudder properly, within the hull?

A. That's right.

(Testimony of Captain Fritz A. Scheibe)

Q. Were the propeller blades of the Pioneer damaged?

A. They were. The tips were bent.

Q. Was the tail shaft damaged?

A. I would have to refer to the report. I don't [155] remember that. There was so much on that.

Mr. Lande: I will stipulate that he can refer to the report, Mr. Verleger, to see.

The Witness: If I can see in it what was done to it.

Q. By Mr. Verleger: You may refer to the report.

A. Yes, the tail shaft was bent.

Q. Did any of the screens on the sea suction show any damage?

A. Yes, they did. They were renewed.

Q. What was the nature of their damage?

A. May I refer to that again?

Q. Yes.

A. They were crushed from coming in contact with the bottom.

Q. Did the planking on the sides of the Pioneer show any damage? I will withdraw that.

Did the plank on the sides of the bottom of the Pioneer show any substantial damage?

A. None of the planking was renewed. There was no damage to the planking on her bottom.

Q. Was there any hole anywhere in the bottom?

A. Only in forefoot.

The Court: Did that go clear through the hull, Mr. Scheibe?

The Witness: No, sir. That went to the dead-wood. [156]

Q. By Mr. Verleger: Captain Scheibe, are you familiar with the construction of the bottom of the Pioneer in the neighborhood of the keel? A. I am.

(Testimony of Captain Fritz A. Scheibe)

Q. Will you draw on this piece of paper a diagram of the construction of the keel and the hull of the Pioneer, of the bottom?

(The witness did as requested.)

Q. Mr. Scheibe, what is the size of the construction of the keel—

Mr. Verleger: I beg your pardon, your Honor. First, I would like to offer as Respondent's Exhibit next in order, for identification, this paper.

The Court: You merely want it marked for identification?

Mr. Verleger: Yes. I think after it has been tied up I can offer it in evidence.

Mr. Lande: I will stipulate it may go in evidence as showing his opinion of the construction of the bottom.

The Court: Mark it in evidence, then.

The Clerk: Marked Respondent's Exhibit B, in evidence.

(The paper referred to was marked Respondent's Exhibit B, and was received in evidence.)

Mr. Verleger: Your Honor, I would like to offer in evidence the photographs to which Captain Scheibe referred, as [157] showing the points on the Pioneer which suffered damage.

Mr. Lande: No objection.

The Court: They are merely illustrative of what they show. I believe the Captain said they did not show the damage.

Mr. Verleger: They show the places, or, at least, many of the places which suffered damage.

The Court: Very well. The photographs will be so marked as merely illustrative.

(Testimony of Captain Fritz A. Scheibe)

The Clerk: Yes, your Honor.

(The photographs, previously marked Respondent's Exhibits A, A-1 and A-2, for identification, were received in evidence.)

Q. By Mr. Verleger: What is the construction and nature of the keel here shown?

A. The keel is wood on this vessel, approximately 12 by 16 inches, 12 inches wide and 16 inches deep approximately. Now, I could give you the exact figure.

Q. How thick is the plank abutted to the keel?

A. The two lower garboard planks are three-inch. The remainder of the planking is two and one-half.

Q. Will you mark the two garboard planks, please?

(The witness did as requested.)

Q. Of what dimensions are the frames?

A. They are sawed frames. Each member is three inches wide. They vary in depth with the curve of the vessel. [158]

Q. From what?

A. They are double, three inch. They are double, two sections, three inches wide, bolted together.

Q. What are the dimensions of the keelson?

A. I don't know that.

Q. Can you give it approximately?

A. Approximately 12 by 12.

Q. Will you show how the keelson and sister keelson is shown on your exhibit, and the frames of the keel?

A. The vessel is built—the keel laid down first, and the frames set down, and all bolted together. This vessel is built by Al Larson, and he uses this method. He puts a drift in, which consists of an iron rod with a head on it, through the frames.

(Testimony of Captain Fritz A. Scheibe)

Q. Does that drift penetrate into the keelson?

A. It is through the frames into the keel. Then the space between the frames is filled with plank. The keelson is then fastened with drifts into the keel along—at different points along the length of the keel. Then the sister keelson on each side is likewise fastened with drifts to the keel. On this picture that is all shown in one section. However, they are spread out throughout the length of the vessel.

Q. Are the garboard planks drifted into the keel?

A. They are. In this vessel the garboard planks, the [159] two garboard planks are fastened like this with drifts into the keel on both sides.

Q. Is this manner of construction stronger than usual in fishing vessels? A. Yes.

Q. What is the effect of that manner of construction, from the point of view of protecting the ship in being struck from below?

A. It ties everything together, the keel, the keelson, the sister keelson and garboard planks.

Q. I will ask you to assume, Captain Scheibe, that the Pioneer stranded at between 6:30 and 7:30; that at the time she stranded that the water line at her bow was about one foot to a foot and a half out of water, and that the water line at the stern was even with the water; that the tide was low at approximately 5:30 in the afternoon and high at approximately midnight, with a 5.6-foot rise in the interim, and that the Pioneer was rolling in a slight swell on the rocks. I further ask you to assume that she was pulled off at between 7:30 and 9:00 o'clock. Under those circumstances, in your opinion, if she had remained on the strand and had not

(Testimony of Captain Fritz A. Scheibe)

been so pulled off, is it likely that she would have come off with the rise in tide?

A. In my opinion, she would have come off with the rise in tide. [160]

Q. Is it your opinion that she would have suffered a great deal of additional damage—well, would have suffered substantial additional damage before she came off with the rise in tide?

A. That is a hard question to answer. I wasn't there. I didn't see the condition of the bottom. However, after the vessel was hauled off, it showed no evidence of rupture in the immediate vicinity of the planking, so I assume there would not have been any damage to the planking.

Q. Do you think that the keel structure was sufficiently strong to endure such pounding as might take place immediately incident to being freed with the rise in tide?

A. Would you repeat the question, please?

(The question was read.)

A. I do.

Q. Does the damage that you have described and that you observed indicate that the Pioneer made substantial contact with the rocks at any point except on its keel?

A. And the rudder and propeller.

Q. Does it indicate that the planking of the vessels was pounding against the rocks? A. No.

Q. As the tide rose, assuming the circumstances as stated to you, is it your opinion there would be more damage or less damage of the planking coming into contact with the [161] rocks?

A. Not of the planking, but of the keel.

Q. Would there be more danger of the planking coming into contact with the rocks?

A. In my opinion, no.

(Testimony of Captain Fritz A. Scheibe)

Q. Why do you say that?

A. When the vessel was seen, there was no evidence there were any rocks near the planking.

Q. In your opinion, Captain Scheibe, if the Pioneer went hard aground at between 6:30 and 7:30, and her bow was from three to five feet—her water line was from three to five feet out of water, could a fishing vessel with a motor of 300 horse-power pulling on a $\frac{5}{8}$ -inch cable free the Pioneer?

Mr. Lande: I object to that, your Honor, as not containing the element as to the manner in which the pulling of the North Queen was done. On a straight pull the evidence is that the line parted but on a swerving back and forth the evidence is that she worked her off.

Q. By Mr. Verleger: In the last question you may assume: If the Pioneer was hard aground and had not in whole or in part been freed by the tide, and was in a position with her bow from three to five feet out of water, could a vessel the size and capabilities of the North Queen, with an engine of 300 horse-power pulling on a $\frac{5}{8}$ -inch steel wire [162] by swerving back and forth pull the Pioneer off? A. No.

Q. Why do you say that?

A. You assume that the bow is four to five feet out of water and it is never hard and fast aground. By pulling with a fishing boat and with a 300 horse-power engine, he hasn't sufficient horse-power to move that vessel when it is hard and fast.

Q. In your opinion, is it essential before such a pulling operation can be successful to have the boat partly freed by the rise in tide? A. It is.

(Testimony of Captain Fritz A. Scheibe)

Q. You may assume that the Pioneer went aground at approximately between 6:30 and 7:30 and the tide conditions were as previously stated; that her bow was approximately one foot to a foot and a half out of water when she stranded, and that she came off between 7:30 and 9:00 o'clock. What, in your opinion, was the principal factor in freeing her? A. Tide.

Q. No further questions. Oh, I am sorry. I do have another question.

In your opinion, Captain Scheibe, and I refer you to Libellant's Exhibit 3, in your opinion, is it sound practice for a vessel of the size and dimensions of the North Queen in taking a towline from a stranded vessel such as the Pioneer [163] to use a double block and a chain from the boom to lift up the line over the nets, and to secure that double block and that chain by wrapping the chain around the cable in such a manner that the cable is held if and when the towing line should part?

Mr. Lande: I object to that, your Honor, that the witness is not qualified to testify to that question. He is not a man that has had experience or special learning in the operation or handling of either fishing vessels or salvage vessels. He is a marine surveyor that makes inspections and makes reports and makes valuations. I submit he is not entitled to answer that question.

The Court: He may have additional qualifications. If he has, they should be elicited, Mr. Verleger.

Q. By Mr. Verleger: Captain Scheibe, what is your experience as a mariner?

A. I graduated from the New York State Nautical School. I held a third mate's license. I served a year as quartermaster on a large vessel, I served as third mate one year, I served as second mate for a year and a half,

(Testimony of Captain Fritz A. Scheibe)

and I served as mate one year. Then I went in the Naval Reserves in—no, I didn't serve as mate. I served as second mate, and then I went in the Naval Reserves in 1917 as an ensign and was promoted to lieutenant, and served in the Navy as an executive officer of a collier, of a tugboat and a small [164] transport in the Philippines until 1922. Then I returned to the Merchant Marine and served as third mate and second mate and first mate and master, and also served at the Wilmington Transportation Works as a deckhand to obtain a pilot's license in Los Angeles Harbor.

Q. In your experience as a surveyor, have you had frequent occasion to consider casualties on fish boats and to estimate the various methods of handling such boats?

Mr. Lande: I will withdraw the objection.

The Court: Will you read the question, please?

(The question was read.)

The Witness: I have had lots of experience in checking on damages on fish boats, but I have never served on a fish boat and, therefore, do not know all the facts about handling fish boats, nets, turntables, and so forth.

Q. By Mr. Verleger: What is the extent of your experience in towing, Mr. Scheibe?

A. Towing transports for the Navy, battle transports; towing other Naval vessels; towing barges.

Q. Mr. Scheibe, is it not of extreme importance in towing, and in any operation when a vessel is required to pull against a substantial resistance at the other end of a line to make certain that the line is so secured as to avoid damage, to minimize damage to the towing vessel if and when the towing line should break? [165]

A. It is.

(Testimony of Captain Fritz A. Scheibe)

Mr. Lande: I object to that as no foundation laid that the man is an expert to so qualify him, so far as this vessel, the North Queen, is concerned.

The Court: That is close to a physical factor, is it not? I mean, that is within common knowledge?

Mr. Lande: If it is possible to do it, yes. The testimony has been so far that with the particular equipment he had to work with he had to do it in this way.

Mr. Verleger: I think, as a matter of fact, witnesses have testified that it would be possible to secure the line in two ways and one did not involve the particular risk that was raised by the other.

Q. By Mr. Verleger: In your opinion, Mr. Scheibe, is it possible to avoid any substantial risk to the rigging of a vessel such as that shown here on Libellant's Exhibit 3, when it is desired to hold the line, the towline above the vessel's nets?

Mr. Lande: I object to that on the ground that the witness is not qualified to answer.

The Court: I think he said he hadn't any experience with these fishing boats. Is that right?

The Witness: I have never been on a fishing boat as a member of the crew. I have been on plenty of them and checked over the equipment. [166]

The Court: Have you ever been on them when they have had occasion to tow another boat?

The Witness: No, sir.

The Court: Sustained.

Q. By Mr. Verleger: Mr. Scheibe, you may assume that on Libellant's Exhibit No. 3 the towline from the Pioneer was held above the nets by a chain wrapped around the cable, which in turn was held to the boom

(Testimony of Captain Fritz A. Scheibe)

by a double block with four 3-inch lines, and that the boom in turn was held back to the mast by four 3-inch lines, and that the mast itself was stayed by a 1-inch steel line. Which of those various lines, including the towline, the double falls and the four lines supporting the boom and the stay supporting the mast is the strongest? I am sorry to say I meant to say is the weakest?

The Court: Which is it now, "strongest" or "weakest"?

Q. By Mr. Verleger: Is the weakest?

A. Am I assuming or knowing the condition of the towline before I answer that? I know the condition of the towline after that.

Q. Then before answering that question, I will ask you what you knew about the condition of that towline?

A. The towline was a $\frac{5}{8}$ -inch wire cable that had been galvanized. When I saw it, it was parted in three places and was very rusty.

Mr. Lande: May I ask a question on voir dire? [167]

The Court: Yes.

Mr. Lande: At what time did you see the towline?

The Witness: When the vessel came into the Harbor Boat Works, the day after the stranding.

Q. By Mr. Verleger: Now, Mr. Scheibe, will you answer the question I gave to you as to the relative strengths of those various lines?

A. It is my opinion that the $\frac{5}{8}$ -inch wire would have broken—all the other equipment on the vessel being in good condition, the wire would have broken first.

(Testimony of Captain Fritz A. Scheibe)

Q. Which would take a greater strain, the lines supporting the boom to the mast or the rigging supporting the mast? A. The topping lift on the boom.

Q. If, therefore, any of the rigging of the North Queen broke under the strain of the conditions that have been described, the anticipatory consequence would be that the boom would fall; is that correct?

A. That is right.

Q. What is the value of the boom and the rigging, including the cost of the labor and installing same?

A. A wood boom that size is worth approximately \$300.

Q. And does that include the cost of installing the boom? [168] A. Yes.

Mr. Verleger: That is all.

Cross-Examination

By Mr. Lande:

Q. And if the boom came down, there would be danger to the crew members?

A. If they were underneath the boom, yes.

Q. And their lives would be in danger?

A. If they were underneath the boom.

Q. As a matter of fact, when things come down you can't be sure what is going to tear down, can you?

A. That's right.

Q. The whole thing could have come down on all the eleven men that were there? A. It is possible.

Q. And whoever happened to be underneath could have had the mast or boom throw him overboard or kill him? A. That is possible also.

(Testimony of Captain Fritz A. Scheibe)

Q. Mr. Scheibe, will you show on your diagram here where the sea suction plates are?

A. I can show it best on the picture.

Q. I wish to have it shown.

A. The sea suction plates are approximately in this position. The sea suction are—they are holes through the side, and these screens go over the outside of them. [169]

Q. Now, Mr. Scheibe, you testified, did you not, that these sea suction plates showed damage from the bottom of the ocean?

A. That is right.

Q. So that the vessel was rocking over on her sides?

A. That's right.

The Court: You have indicated those on Respondent's Exhibit B, have you not?

The Witness: That is right. Do you want me to mark that "Sea Suction Screen"?

Mr. Lande: Yes.

Q. By Mr. Lande: Isn't it true that if she rocked over so far that she would hit her sea suction screens, she could have rocked over far enough to puncture her sides?

A. Depending on the condition of the sea.

Q. That could have happened, couldn't it?

A. It is possible, if the sea had gotten rougher.

Q. Or if she had started to roll more?

A. If she had rolled more, it is possible.

Q. When she went on there first, she went on there hard, didn't she?

A. I don't know.

Q. As a matter of fact, you haven't been engaged in any salvage operations yourself, have you?

A. Yes, I have. [170]

Q. How many?

A. Oh, on the Congress, the Kingfisher, the Sweet.

(Testimony of Captain Fritz A. Scheibe)

Q. In what capacity were you?

A. Surveyor, representing the underwriter.

Q. All right. Were you there when the vessels were salvaged?

A. Yes.

Q. Did you direct the salvage operations?

A. I had a salvage master, a salvage company doing the operations.

Q. Now, these ribs that you have going out here, what do you call them?

A. Frames.

Q. Frames. They are spaced about how far apart?

A. Depending on the size of the vessel and the size of the frames.

Q. We are talking about the Pioneer.

A. I can't tell you offhand. I have no survey report that gives me that information. I can't remember.

Q. What would be the approximate distance?

A. Between centers, 18 inches at the most.

Q. In other words, it would be 18 inches—

A. Between centers. They are 6 inches wide themselves.

Q. That would mean that would be 12 inches in between?

A. That is right. [171]

Q. In that 12-inch space you have 2½-inch planking?

A. That's right.

Q. And it is in that 12-inch space where the hull is punctured if she rolls over on the rocks and becomes punctured?

A. It is possible; also on the frames.

Q. It could break a frame?

A. Yes.

Q. But the easiest place would be between the frames?

A. Yes.

(Testimony of Captain Fritz A. Scheibe)

Q. This vessel was rocking quite a bit, wasn't it, to smash the sea suction screens?

A. Yes, and it didn't crush them. It crushed the strainers.

Q. In order to crush the strainers she had to get over that far? A. Yes.

Q. Now, on your keel, that keel is 16 inches deep?

A. Yes.

Q. And half of that was damaged? A. Yes.

Q. It takes a tremendous amount of rocking on those rocks to damage 8 inches by 12 inches solid pine, does it not?

A. A good bit of that might have been torn up when he went aground. I don't know. [172]

Q. It not only damaged his keel, but he had his hardwood and his iron shoe underneath damaged. And what did you say happened to that?

A. It was torn off.

Q. It was torn off?

A. Yes. That is spiked on.

Q. Now, this damage to his propeller blades, that would mean that his ship would have to roll enough so that the propeller blade would come in contact with the rock on the sides; isn't that right?

A. That's right.

Q. And that propeller blade is protected underneath by the keel shoe? A. That's right.

Q. So that we know, then, that the boat not only rocked enough to do damage to the suction knobs, but also to the propeller, as she rocked from side to side?

A. It could have been rocking and a rock be in the vicinity of the propeller.

(Testimony of Captain Fritz A. Scheibe)

Q. And the rock that could have been in the vicinity of the propeller could have been a rock that might have punctured the hull; isn't that right?

A. Not while she stayed aground.

Q. No, but if she was working and rocking off of there, that is the damage that could happen? [173]

A. But the rock in the vicinity of the propeller did not damage any planks.

Q. Suppose that the rise in tide carried the vessel in with it. After all, when the tide rises there is a current that goes in shore, isn't there?

A. I don't know how the current runs there on the tide.

Q. You don't know that?

A. I don't know how the current runs in that area with the tide.

Q. If it is an incoming tide, the tide and the current of the tide is going inshore, regardless of the—

A. The swell goes inshore. The current may run parallel to the shore, the tidal current.

Q. You don't know what it is there?

A. No, I couldn't tell you. I would have to look at the tide chart.

Q. Will a tide table show you?

A. No, it will have to be a current chart.

Q. Will a current table show you?

A. A current table might show it to me.

Q. Here it is on January 9th. Is that what you wanted?

A. No, that doesn't show the direction. You would have to have a current chart. That shows the direction.

Q. Well, let's assume that as the tide rose the current was going inshore. [174]

(Testimony of Captain Fritz A. Scheibe)

Mr. Verleger: Your Honor, I object on the ground that there is no evidence at all as to which direction the current went.

Mr. Lande: All right. We will lay the foundation later.

Q. By Mr. Lande: Now, you have answered some questions as to what you thought would happen to this vessel when the tide rose. Your answers were not based on any experience you had in salvage of vessels and watching the operations actually being done, were they?

A. Yes, and service on ships that went aground.

Q. But each salvage operation and each freeing is dependent upon the particular factors involved?

A. That's right.

Q. So that your experience does not extend over a series of years in working in freeing vessels that have been stranded?

A. Not just vessels that were stranded, no.

Q. When you were working at the L. A. Harbor, towing, you were towing vessels that were totally free, were you not?

A. That's right.

Q. Towing them from one berth to another?

A. That's right.

Q. No question of straining or working the vessel off, or the best way to get it off?

A. That's right. [175]

Q. You have no experience along that line?

A. Some.

Q. What?

A. Well, I have stranded in the Straits of Magellan and towed the ship off.

(Testimony of Captain Fritz A. Scheibe)

Q. Were you in charge of that operation?

A. I was first mate. The master was in charge. And I was ashore in Shipu, China.

Q. Isn't it a fact, Captain Scheibe, when the vessel first went on the rocks, whether it was the Pioneer or any other vessel, and she strikes hard at low tide, she is held more or less securely in a grounding, isn't she?

A. It depends on the condition of the bottom.

Q. All right. Let's suppose it is a rock bottom.

A. Yes.

Q. And the vessel that goes aground shows damage along the entire keel way back into the rudder, and from the bow to the rudder,—

A. That's right.

Q. —when she first goes ashore, she is held securely, isn't she?

A. That's right.

Q. Now, if you have an incoming tide, so that you are getting a little buoyancy and there is a ground swell that is broadside, then your vessel begins to rock, doesn't it? [176]

A. Yes.

Q. And then she begins to work?

A. Yes.

Q. And that is when the damage occurs, isn't it?

A. Some damage occurs then, yes.

Q. Well, the amount of damage, of course, you don't know, do you?

A. No.

Q. If there is enough buoyancy and enough ground swell, and if the rocks are present in the right position, she can puncture and flood and be a total loss?

A. That's right.

Q. So you don't know, Captain Scheibe, that before she came free, and we are talking about the Pioneer,—

A. Yes.

(Testimony of Captain Fritz A. Scheibe)

Q. —before she came free at high tide, you wouldn't know between the time she got stranded and high tide whether or not she would be punctured? A. No.

Q. She could very well have punctured, couldn't she?

A. If there were rocks in that area, she could very well have punctured.

Q. You know under the hypothetical question that there were rocks in that area, don't you?

A. I was told to assume there were rocks in that area. [177] If there were rocks in that area, she could have punctured, yes.

Q. Very easily? A. Yes.

Q. Probably if the vessel showed damage where her suction pumps were, even under the circumstances that did exist? A. Yes.

Q. In other words, wouldn't you say there was a likelihood she would have punctured her sides with the increased rocking until the high tide came along?

A. I can't say that.

Q. Captain Scheibe, you acted as a marine surveyor for the insurance company on the Pioneer, did you not?

A. That's right.

Q. Are your employers financially interested in the outcome of this law suit?

Mr. Verleger: I object, your Honor. I think first it should be established—I think there is an assumption that Captain Scheibe is employed continuously by the insurance company, or something like that. If the question is relevant at all, I think that should be established. I am perfectly willing to stipulate insofar as the question of Captain Scheibe's interest in this litigation is concerned that I employed him as a surveyor in connection

(Testimony of Captain Fritz A. Scheibe)

with this matter and that I expect, as a matter of fact, to pay him a fee for coming [178] up and testifying as an expert. But, as a matter of fact, the two jobs are entirely different and I don't think, or, as a matter of fact, I am quite sure that Captain Scheibe does not know the answer to the question.

Mr. Lande: Maybe he does know.

The Court: I don't want any argument, gentlemen. Let him finish his objection.

Mr. Lande: I thought he was.

Mr. Verleger: It seems to me since there is no question but what Captain Scheibe is appearing as an expert witness for a fee, the question as to any further exploration as to his interest in the outcome of this thing is quite irrelevant.

The Court: Oh, no. Overruled. Now, we will have the question read.

(The question was read.)

The Witness: I have no employers at present. I am an independent surveyor. I work for a fee on individual jobs.

Q. By Mr. Lande: Do you know whether or not the people who employed you to make the survey that you did make on the Pioneer are financially interested in the outcome of this action?

A. A broker employed me on this, and I have no idea if he has any financial interest in the boat.

Q. He was a broker for an insurance company?

A. That's right. [179]

(Testimony of Captain Fritz A. Scheibe)

Q. Now, did you know that the North Queen was entirely rebuilt in March of 1946?

A. I knew there was certain work done on it when I made the survey in April for a broker.

Q. Would it have made any difference in your estimate of the fair market value and the depreciation on it if the vessel was a purse seiner that was built privately, and in 1942 was taken over by the Navy and operated by the Navy, then taken back by the private owner and then completely rebuilt and refitted as a purse seiner in March of 1946?

A. In March of 1946? May I have the question, please?

(The question was read.)

A. The question is whether I would make any difference in the value?

Q. Yes. Would you increase her value?

A. Not for insurance purposes. That value I stated—I have no figures in front of me. That is last April. I have figured several boats, quite a few boats since.

Q. Would it help you if you saw the survey here?

A. On the North Queen?

Q. Oh, you haven't got the survey on the North Queen?

A. No, I have no survey on the North Queen.

Q. Your testimony is now that the figure of \$125,000 may be off; is that correct?

A. That is correct. That is as far as my memory goes. [180]

(Testimony of Captain Fritz A. Scheibe)

Q. You say you surveyed it for insurance purposes. That does not mean that is what a person could sell the vessel for, and what a fisherman wanted the vessel for?

A. That is not a market value. That is a depreciated value.

Q. So that the market value naturally is higher, isn't it?

A. Depending on the fishing conditions and whether a man has to sell his boat, or whether someone else wants it real bad.

Mr. Lande: All right. That is all, your Honor.

The Court: Was that a replacement value, Captain?

The Witness: That is my—as far as my memory goes, your Honor, that was the replacement value as of that date.

The Court: In other words, you think that at that time that ship could have been built, replaced, for that amount of money?

The Witness: Yes, sir.

Q. By Mr. Lande: Captain, do you think that an oil screw vessel of 150 tons gross, and a length of 82 feet, with a sardine net on her and an Atlas Imperial 320 horse-power engine, with two auxiliaries, could have been built for \$125,000 in January of 1947?

A. I said April. In April I made my report, as I remember it, and I never included the net in the value. [181]

Q. You never what?

A. I didn't include the net.

The Court: The question assumes, I think, that there would be no change between January and April.

A. Between January and April, yes.

(Testimony of Captain Fritz A. Scheibe)

The Court: Was that your understanding?

The Witness: That is right, but I never put a value on the net.

Mr. Lande: All right. - Thank you, sir.

Mr. Verleger: That is all.

(Witness excused.)

Mr. Verleger: The only remaining evidence I have is the depositions of John Joncich, Andrew Joncich and Lloyd Judy, who were members of the crew of the Sunlight. I would like to avoid reading the depositions into evidence, and I would like to suggest, if counsel is willing, to stipulate that the depositions be deemed as read and to offer them in evidence.

Mr. Lande: All right. We will stipulate that the only point about them is that they happened to come up while they were pulling the Pioneer off.

Mr. Verleger: I would like to have the depositions go in.

The Court: So ordered for all depositions. I read a portion of them, and I will read the rest of them. They may [182] be marked in evidence.

The Clerk: The depositions will be marked as Respondent's Exhibit C in evidence.

(The depositions referred to were marked Respondent's Exhibit C, and were received in evidence.)

The Court: How many more witnesses have you?

Mr. Verleger: That is my last witness, except that I want to call Captain Joncich for one more question on direct in connection with the depositions.

The Court: Very well.

CAPTAIN MARION JONCICH,

recalled as a witness on behalf of the respondent, having been previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Verleger:

Q. Captain, are either John Joncich or Andrew Joncich, who were master and member of the crew of the vessel Sunlight, related to you, so far as you know?

A. Not what I know, no.

Mr. Verleger: That is all.

(Witness excused.)

Mr. Lande: I will recall Captain Varnum. [183]

CAPTAIN MYRON VARNUM,

called as a witness on behalf of the libelant, in rebuttal, having been previously sworn, testified further as follows:

Direct Examination

The Court: Is there anything in the record showing the alleged or claimed value of that fish net?

Mr. Lande: No. Perhaps I should put that in, your Honor. I just want to ask this witness a few questions.

The Court: Very well.

By Mr. Lande:

Q. Captain Varnum, in your opinion, assuming the facts I gave you in the hypothetical question on direct examination, would a 400-pound anchor and a 600-pound anchor be sufficient for a vessel like the one I described to pull itself off of a stranding, assuming that the bottom at that place was rock?

(Testimony of Myron Varnum)

A. Well, unless the anchor got caught behind a rock so that it would hold, the weight of the anchor was of the right size that it would heave it home—what did you say the weight of the anchor was? 500—

Q. One 600 pounds and one 400 pounds.

A. You would heave it right home on the bottom.

Q. What weight anchors do they use when they attempt the use of an anchor for a salvage operation?

A. Well, in the business I have been in, we use heavy anchors. [184]

Q. Will you tell the court how heavy?

A. They weigh from 7,000 to 10,000 pounds, three and a half to five tons. That is very heavy work.

Mr. Lande: That is all, Captain.

Cross-Examination

By Mr. Verleger:

Q. May I ask the captain one question: Captain, if the hooks of the 700-pound, or the 750 and the 500-pound anchor caught on the shore, is it not possible they could be used to pull off a vessel the size of the Pioneer?

Mr. Lande: Caught on the shore?

Mr. Verleger: Caught on the bottom.

The Witness: If they caught, they would hold, and you had a good while there.

Q. By Mr. Verleger: And the further out the anchor is dropped from the vessel, the more likely they are to hold?

A. That is right.

Q. You mentioned that you used 7,000 to 10,000-pound anchors in your business. Isn't it true that vessels have on many occasions managed to pull themselves off of strands by using their own anchors, through the

(Testimony of Myron Varnum)

many years in which vessels have gotten into that sort of position?

A. Yes. And I have used them, or, I have been on ships where we have used our anchors and punctured our bottoms and stayed there fast aground, too. [185]

Q. That couldn't happen if the anchor was dropped out deep enough so that the anchor couldn't—

A. It is a pretty hard job to get the anchor out that way.

Q. Are the 7,000 to 10,000 pound anchors special anchors that are used for salvage purposes?

A. They are. They are called eel's anchors.

Mr. Verleger: I think that is all, your Honor.

Mr. Lande: That is all.

(Witness excused.)

Mr. Lande: Mr. Xitco.

ANDREW XITCO, JR.,

called as a witness on behalf of the libelant, in rebuttal, having been previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Lande:

Q. Mr. Xitco, what was the value of the sardine net you had on the turntable on the night of this salvage?

A. \$15,000.

Q. Mr. Xitco, the estimate you gave of \$170,000 for your boat on January 9th, is that what you considered to be the fair market value of your boat on that date?

A. Yes, I did.

Q. That included the net and all?

A. That included the net, the skiff and all. [186]

(Testimony of Andrew Xitco, Jr.)

Q. And the equipment? A. And the equipment.

Q. I believe you quoted the \$170,000 by stating you included the equipment, and which equipment you meant included the net? A. Yes.

Q. Now, referring to these anchors, let's assume, and I will call the court's attention to the answer to our interrogatories, the answer to the 13th interrogatory is, "One of the anchors was carried on the port and the other on the starboard hawse-hole on the bow of the Pioneer." Assuming that to be so, what power could have been used to pull on those anchors, assuming they could have been dropped?

Mr. Verleger: I think, your Honor, I will object to that on the ground that no foundation has been laid to show the witness' familiarity with the equipment used.

Q. By Mr. Lande: Have you seen the Pioneer?

A. Yes.

Q. Do you know what type of anchor she has?

A. She has an anchor very much like we have.

Q. And do you know the horse-power of that winch?

A. Well, we have a 20 horse-power on it, and that is about what they all have, probably 15 to 25 horse-power on the forward winch.

Q. So that the most horse-power she could have on her [187] winch forward would be 15 to 25 horse-power?

A. That's all.

Q. Would she be able to draw directly on those anchors if they dropped out 50 to 75 fathoms forward?

A. No, they would have to come out of the hawse-holes, and you couldn't put them forward. You have to get them in back of the boat, out towards the sea, and drop them.

(Testimony of Andrew Xitco, Jr.)

Q. In other words, using this model here, and first show the court where the hawse-holes are.

A. They are right here (indicating).

Q. Referring to the bow, and showing a place right underneath the stem?

A. Yes, right here is the anchor. We have one on the port and one on the starboard, and you have to run the wire way back here with the anchor and heave them with the anchor winch. It goes out that hole, and there would be that friction there, and binding, and pulling and coming out, and with a 15 horse-power motor like we have, or with a 15 to 25 horse-power like they have on those purse seiners—

Q. I see. And you say the friction in the way you would rig the chain?

A. —it would cut down the pull quite a bit with all that friction.

Q. And that chain could not be used on the winch aft to do it? [188]

A. Well, he doesn't have that much chain to go out there. He said it was 225 fathoms beyond the kelp. That is 1500 feet. They don't have any 1500-foot chain, and he doesn't have that much wire. Generally a boat carries about 100 fathoms.

Q. For your information, the answer shows that she had a 125-fathom chain.

A. Yes, but not 225.

Q. Wouldn't that 125-fathom chain have carried their anchors out beyond the kelp?

A. Well, it would only carry it out for as much as they have, but not carry it out to clean bottom, where we were at the time.

(Testimony of Andrew Xitco, Jr.)

Q. What would have been the effect of dropping the anchors on the kelp?

A. I don't know what the effect would be.

Q. What would have happened when he started to take up the anchors?

A. With all those things, he wouldn't have the power, he would lose it in the binding of the chains, and you get a chain coming out of a hawse-hole,—well, you can practically stop it, with doing no pulling at all, because it binds there. It is a three-quarter chain at least and it binds there, and it won't pull. Without even trying to pull the boat off, it wouldn't take much to stop the chain as it is right there. [189]

Q. In your opinion, could he have used his anchor?

A. The hawse-hole is made to pull up ahead. They are tapered. They are not tapered to pull up astern. In other words, there is a sharp corner there, so they are forward, to pull forward, and not astern. So that three-quarter chain would just get caught and bind, and to try to pull would be impossible.

Q. In other words, it is your conclusion that in taking the anchors aft with the chain would have been impossible?

A. Yes, with the chain he had, it would have been practically impossible. The cable would have more give there, and wouldn't—

Q. But these were attached to the chains?

A. One was on the chain, and the other partly wire and chain.

Q. Would it have taken time to re-rig those anchors so as to take the chains off and put the cable on and put snap blocks on?

(Testimony of Andrew Xitco, Jr.)

A. He can only use chains on one side, and the cable, they have a drum for the cable on the port side, and on the starboard side they have a windlass, which is for chain alone. You could only—the way she is rigged up, you have to use a chain and a cable.

Q. You could not use two cables?

A. No. [190]

Mr. Lande: You may cross-examine.

Cross Examination

By Mr. Verleger:

Q. Isn't it possible, Mr. Xitco, in an emergency of that sort, after the anchor has been dropped, to rig the line from the anchor so that it can be pulled from the stern winch?

A. It is possible on the stern winch with a cable anchor, but his cable anchor is on the port side, in towards the port.

Q. Couldn't he take and place his anchor, put it in a skiff, secure it to cable, and take it out and pull the cable on the stern winch?

A. He could, but he wouldn't—

Q. And doesn't he have the full power of his engines on that winch?

A. No, he doesn't have no 400 horse-power on his back winch. He must have about 40 horse-power.

Mr. Verleger: That is all. No further questions of Mr. Xitco.

Mr. Lande: That is all.

(Witness excused.)

Mr. Lande: May I call Captain Scheibe again, your Honor, for further cross examination?

Take the stand, please? [191]

CAPTAIN FRITZ A. SCHEIBE,

called as an adverse witness on behalf of the libelant, having been previously sworn, testified further as follows:

Cross-Examination

By Mr. Lande:

Q. Captain Scheibe, can you tell us what your estimate of the fair market value of the Pioneer was on January 9, 1947? Or, should I ask the replacement value, seeing you placed a replacement value on the North Queen?

A. I don't have those values. Mr. Verleger has a survey. If I can refer to that, a copy of a survey I made last year.

(A document was handed to the witness.)

Q. What do you show as the replacement value?

A. I show a replacement value of \$150,450, and a present value—this is as of July, 1946—of \$134,500. Had I made a survey of her in January for insurance purposes, not a market value, I would have taken five per cent off of that present value.

Q. You think a replacement value was around \$150,000? A. \$150,000. That is without the net.

Q. That is without the net? A. That is right.

Q. Have you any idea what the net was worth?

A. I have no idea what the value of the net was, don't [192] know the size of it, or anything.

Mr. Lande: Will you step down, please, unless you have some questions, Mr. Verleger?

(Testimony of Captain Fritz A. Scheibe)

Redirect Examination

By Mr. Verleger:

Q. One further question, Captain Scheibe: Do you know what the cost of the repairs to the Pioneer following the stranding was?

A. It is shown in the report as sixteen thousand some dollars for hull repairs, and then an additional seven or eight hundred dollars for the wire.

The Court: Isn't that in the interrogatories?

Mr. Verleger: Yes, your Honor, it appears in the interrogatories.

The Witness: \$16,432.20 is the Harbor Boat Building Company.

Q. By Mr. Verleger: And there is an additional amount of \$813.07— A. For wire.

Q. —for wire? Is that correct, Captain Scheibe?

A. That's right.

Mr. Verleger: That is all.

(Witness excused.)

Mr. Lande: Captain Joncich. [193]

CAPTAIN MARION JONCICH,

called as an adverse witness on behalf of the libelant, having been previously sworn, testified as follows:

Cross-Examination

By Mr. Lande:

Q. Captain Joncich, what was the value of the net, the sardine net that you had on board the night your vessel stranded?

A. It ran around \$15,000, something like that.

(Testimony of Captain Marion Joncich)

Mr. Lande: Thank you. That is all.

(Witness excused.)

Mr. Lande: We rest, your Honor.

Mr. Verleger: I would like to ask one question of Mr. Mardesich, your Honor.

JOE MARDESICH,

called as a witness on behalf of the respondent, in sur-rebuttal, having been previously duly sworn, testified further as follows:

Direct Examination

By Mr. Verleger:

Q. Mr. Mardesich, could you exert the full power of your engines on a cable from your stern winch to an anchor dropped out some distance from the vessel?

A. Well, if you have sufficient power, like we had, our main engine running and our stern winches, our main engine [194] has 400 horse-power. Now, with that power we have a 60 horse-power clutch, and you can do anything with it. You can make it just like a solid, if you want it. You can cinch up on that until it is like a part of the engine, if you understand what I mean, and then you have enough power on your winches to pull as much as the shaft will stand, or the bearings, or whatever is the weakest point, which is usually the line you are pulling. There is such a reduction down to the niggerheads, which are the winches, if you know what I mean.

Q. In your opinion, could you have put as much strain against such a line as the line would stand?

A. Yes. I think any line, and some are better, would snap before you would lose any power.

(Testimony of Joe Mardesich)

Q. And assuming you dropped an anchor so rigged, you could so rig the line from there as to take it on your stern winch?

A. It could be done, but it would be a very slow process though.

Mr. Verleger: That is all, your Honor.

(Witness excused.)

Mr. Verleger: We rest, your Honor.

The Court: Now, gentlemen, you have this case to argue, of course. Let me see our calendar.

Will you be ready to argue this case tomorrow morning. [195] gentlemen?

Mr. Verleger: Yes, sir.

Mr. Lande: Yes, your Honor.

The Court: I think we will hear the argument in the morning. We will allow 45 minutes on each side, and resume the session at 10:00 o'clock tomorrow morning.

Mr. Lande: Your Honor, may I at this time withdraw the model from the court room?

The Court: Is there any objection?

Mr. Verleger: No objection if a picture will be inserted for it.

Mr. Lande: It will.

The Court: I will leave it to you, Mr. Lande, to have the photograph taken.

Mr. Lande: I will personally take the photograph, your Honor.

The Court: Very well.

[Endorsed]: Filed Mar. 4, 1948. Edmund L. Smith, Clerk. [196]

[Endorsed]: No. 11879. United States Circuit Court of Appeals for the Ninth Circuit. Marion Joncich, Joe C. Mardesich and Antoinette Bogdanovich, Appellants, vs. Andrew Xitco, Jr., Appellee. Apostles on Appeal. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed March 9, 1948.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11879

MARION JONCICH, JOE C. MARDESICH and
ANTOINETTE BOGDANOVICH,

Appellants,

vs.

ANDREW XITCO, JR.,

Appellee.

APPELLANTS' STATEMENT OF POINTS AND
DESIGNATION OF PARTS OF RECORD

(Rule 19, Subd. 6)

Appellants, Marion Joncich, Joe C. Mardesich and Antoinette Bogdanovich, hereby adopt the assignments of error appearing in the record in the above entitled case as their statement of points on which they intend to rely on appeal.

Appellants, Marion Joncich, Joe C. Mardesich and Antoinette Bogdanovich, hereby designate the following parts of record in the above entitled matter, which they believe necessary for consideration by the Court of said points:

* * * * *

Dated: March 17, 1948.

McCUTCHEN, THOMAS, MATTHEW,
GRIFFITHS AND GREENE
HAROLD A. BLACK
PHILIP K. VERLEGER

Proctors for Appellants

[Affidavit of Service by Mail.]

[Endorsed]: Filed Mar. 19, 1948. Paul P. O'Brien,
Clerk.

No. 11879

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MARION JONCICH, JOE C. MARDESICH and ANTOINETTE
BOGDANOVICH,

Appellants,

vs.

ANDREW XITCO, JR.,

Appellee.

OPENING BRIEF FOR APPELLANTS.

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No. 11879

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MARION JONCICH, JOE C. MARDESICH and ANTOINETTE
BOGDANOVICH,

Appellants,

vs.

ANDREW XITCO, JR.,

Appellee.

OPENING BRIEF FOR APPELLANTS.

This appeal is from a final decree in admiralty of the District Court for the Southern District of California, Central Division, Hon Paul J. McCormick, Judge presiding, which adjudged that appellee Andrew Xitco, Jr. recover from the fishing vessel PIONEER, and appellants Marion Joncich, Joe C. Mardesich, and Antoinette Bogdanovich, jointly and severally, the sum of Twelve Thousand Dollars (\$12,000) for salvage services rendered by the fishing vessel NORTH QUEEN to the fishing vessel PIONEER on the night of January 9, 1947. The Court rendered an oral opinion ordering a decree for appellee in the aforesaid amount [A. 49]. Formal findings and conclusions of law were prepared by counsel for appellee, signed on November 12, 1947 and entered on that date. A judgment in accordance therewith was signed, filed and entered on the same date [A. 61].

Statement as to Jurisdiction.

Admitted allegations in the pleadings show that the cause set forth in the libel is for salvage and is of admiralty cognizance, of which the District Court had jurisdiction by virtue of the constitutional grant of admiralty jurisdiction (Art. III, Sec. 2), and Sections 24 and 256 of the Judicial Code (28 U. S. C. A., Sec. 41 (3); 371).

The jurisdiction of this Court to review the said decree rests upon Section 128 of the Judicial Code (28 U. S. C. A., Sec. 225), assignments of error [A. 62] duly filed, a petition for appeal [A. 61] duly filed and allowed [A. 67] citation [A. 2], and notice of appeal [A. 68] duly served and filed.

Statement of the Case.

Prefatory Statement.

In this case the fish boat PIONEER, of a salved value of \$112,567.80. stranded on a rocky bottom off Laguna Beach, California, 30 miles from San Pedro, on January 9, 1947. She attempted to back off, could not, and, while preparing to jettison fuel, wirelessly for help. The fishboats NORTH QUEEN and SUNLIGHT came promptly. The NORTH QUEEN took a cable from the PIONEER, made one unsuccessful attempt to pull off the PIONEER, which was frustrated by the breaking of the cable, and, upon a second attempt freed the PIONEER. The tide was rising throughout. About an hour and a half to two hours was required for the service. The weather was calm and peaceful. The SUNLIGHT was preparing to take a line when the PIONEER came off. The PIONEER made port under her own power. Twelve Thousand Dollars (\$12,000) was awarded for the service by the

NORTH QUEEN. It is contended by appellants (a) that the award is manifestly excessive, and (b) that there was serious error in the standards applied in determining the award, the most serious of which is that the availability of other assistance was not given any consideration whatsoever in determining the award.

Detailed Statement.

The PIONEER is a diesel fishing boat valued, including its net, \$129,000 prior to its stranding on January 9, 1947 [A. 57]. She had a dead weight tonnage of 183 tons gross, 99 tons net; 86.4 feet in length; and was built in 1944 [A. 57].

The NORTH QUEEN is a diesel fishing boat of the same general type as the PIONEER, of 150 tons gross, and length of 82 feet. Her value is alleged in the libel to have been \$125,000 [A. 3]. Her value is found to have been \$135,000 including net [A. 56]. There was expert testimony that her depreciated replacement value was about \$100,000 [A. 198], and that there was no consistent market price for such vessels. Her owner testified to a value of \$170,000 including all equipment [A. 165].

The SUNLIGHT is a diesel fishing boat 81 feet in length, 22 feet beam, unknown tonnage and value, and 250 h. p. diesel engine [A. 23-24].

At approximately 6 p. m. on the night of January 9, 1947, the PIONEER left Newport, California [A. 168], and between 6:30 and 7:00 p. m. she stranded on submerged rocks in waters off Laguna Beach, California [A. 57]. This was shortly after low tide, which was approximately at 5:30 p. m. [A. 112]. High tide was at midnight, with a rise of about 5.6 feet anticipated [A. 112].

The PIONEER attempted to back off the rocks but did not succeed [A. 170]. The master of the PIONEER then ordered her skiff, which was being towed astern [A. 179], forward to get the anchor of the PIONEER [A. 170, 180]. At the same time she sent out a distress signal [A. 57, 170].

At the time the PIONEER stranded the sea was smooth, with a slight ground swell [A. 27, 132, 169]. The PIONEER was not pounding on the rocks but there was a slight rocking motion of about 5 to 10 degrees on the surge of the swell [A. 133, 170]. Her hull was not punctured in the course of the stranding [A. 262], and she was not leaking when she came off [A. 177].

Before the anchor was placed in the skiff, the PIONEER got the SUNLIGHT on the radio [A. 170], and the SUNLIGHT commenced to come to the assistance of the PIONEER [A. 25]. After the PIONEER got the SUNLIGHT on the radio, the master of the PIONEER told the engineer, Joe C. Mardesich, to jettison some fresh water [A. 171]. He immediately commenced jettisoning fresh water, and making preparations to jettison fuel [A. 188-192]. At the same time the master of the PIONEER told his crew to put a coil of rope in the skiff [A. 171] and they put 125 fathoms of line in the skiff, keeping 100 fathoms on the PIONEER [A. 171].

The NORTH QUEEN arrived before the SUNLIGHT on the scene of the stranding and received the rope from the PIONEER [A. 91]. At the time of the arrival of the NORTH QUEEN, the skiff had the line already in it and was rowing out towards the NORTH QUEEN [A. 91].

The NORTH QUEEN approached the PIONEER bow first, stopped before it reached the kelp surrounding the rocks

on which the PIONEER was stranded [A. 91]. How close the NORTH QUEEN approached to the PIONEER is a matter concerning which there is some superficial uncertainty. The full 225 fathoms of rope in the skiff and on the boat were paid out [A. 171, 181, 183]. The testimony from a man in the skiff was that the closest the NORTH QUEEN came to the PIONEER was about 200 fathoms. The testimony of Captain Joncich of the PIONEER was to the same effect [A. 171-172]. Matt Berry of the NORTH QUEEN testified that the NORTH QUEEN did not come closer than 300 to 400 feet of the PIONEER [A. 132]. The master of the NORTH QUEEN testified that they came to within 200 feet of the PIONEER [A. 91].

The normal position of the water line of the PIONEER is about 5 to 6 inches above sea level [A. 83]. At the time the NORTH QUEEN arrived, according to the testimony of the master of the NORTH QUEEN, the water line of the PIONEER at its stern was about even with the water, and the water line at the bow of the PIONEER was about 5 feet out of water [A. 82]. Matt Berry of the NORTH QUEEN put the bow of the PIONEER at from three to four feet out of water [A. 132]. Vincent Zuanich and Paul Tipich of the PIONEER, who were in the skiff at the bow of the PIONEER preparing to take the anchor, shortly after the PIONEER stranded, state that the water line at the bow was out about a foot [A. 180, 183]. There is no finding on the point. Curiously, the testimony of Mr. Xitco appears to be that, despite the rising tide, the level remained the same throughout the operation [A. 127].

The manila line from the PIONEER was used to pull a $\frac{5}{8}$ " steel wire from the PIONEER to the NORTH QUEEN [A. 58, 102]. In order to avoid fouling the wire with the nets and boat at the stern of the NORTH QUEEN, a

line from the boom of the PIONEER was used to lift the wire clear of the nets and turntable; with the assistance of this expedient, the wire was brought over the stern and secured to the main bitts of the PIONEER [A. 58]. After the wire was secured, and a strain was taken on it, the wire parted [A. 58]. It parted inboard of the point where the line from the boom was secured, and the man stationed at the winch released the line going up to the boom, and thence down to the line, so as to ease off the strain on the rigging [A. 103]. The line fouled in the block through which it passed and, as a result, the wire to the PIONEER was held [A. 136]. The wire was again secured and the NORTH QUEEN again pulled, and this time the PIONEER came clear [A. 58]. The NORTH QUEEN stood by while the PIONEER tried out its engines and rudder, and thereafter the PIONEER went, under its own power, to San Pedro, and the NORTH QUEEN cruised for a while, without, however, doing any fishing [A. 107]. The operation was completed at some time between 8 and 8:30 p. m. [A. 127, 178]. The total time occupied was about an hour and a half to two hours.

There was testimony, both ways, as to whether the NORTH QUEEN used a "leverage maneuver," pulling from several angles, in the effort to free the PIONEER on the second occasion [A. 29; 104-105].

Prior to the time the PIONEER came off, the SUNLIGHT had arrived and had taken a manila line, preparatory to pulling another wire on board, so that if one boat could not alone pull the PIONEER off, two would try [A. 28, 185]. Her master testified that she arrived before the line from the NORTH QUEEN snapped, and saw it break [A. 28]; There was, however, testimony that she arrived after it broke [A. 181].

The PIONEER suffered damages, the cost of repair being \$16,432.20 [A. 59].

An award of Twelve Thousand Dollars (\$12,000) was given.

Questions in the Case.

(1) Does the award in this case exceed by far the awards made in comparable cases, and depart from the “path of authority”; is this departure in itself so palpable as to constitute a legal error?

(2) Is the award a consequence of legal error in that the Court, in fixing it, disregarded the material factor that that other assistance than the NORTH QUEEN was available, and that the incident occurred close to port?

(3) Is the award a consequence of legal error in that the Court gave slight, if any, consideration in determining the award to the lack of danger incurred by the salvor?

(4) Is the award a consequence of legal error in that the Court did not consider that the service was rendered without expense to the salvor but, on the contrary, improperly assumed a loss of fish?

(5) Is the award a consequence of legal error in that the Court, with regard to the danger of the PIONEER, considered only its position on the rocks, and failed to consider its capacity to help itself, and the rising tide?

(6) Was the award, for all practical purposes, made solely on the basis of one factor, the skill and promptness of the assistance?

Specification of Errors.

The errors which we urge are, of course, parallel with the questions which we have stated are involved in the case. They are as follows:

I.

It is error to grant an award which is palpably excessive and which departs from the path of authority [Assignments of Error, XX and XXI, A. 66].

II.

It was error to disregard the fact that assistance other than the NORTH QUEEN was immediately available and that the stranding occurred in close proximity to a great port [Assignments of Error, XVI and XVII, A. 65].

III.

It was error to give slight or no consideration in determining the award to the lack of danger incurred by the salvor [Assignments of Error, XI and XVII, A. 64-65].

IV.

It was error to omit to consider the lack of expense to the salvor, and to consider in determining the award that there was a probable loss of fish to the salvor, in the absence of evidence supporting such a loss [Assignments of Error, XIX, A. 66].

V.

It was error, in considering the danger of the PIONEER, to consider only the fact that she was on the rocks, without considering its capacity to help itself in the rising tide [Assignments of Error, III, IV, V and VI, A. 62-63].

VI.

It was error to place virtually exclusive emphasis on skill in determining the award [Assignments of Error, IX, X, XI and XVIII, A. 64-65].

ARGUMENT.

Summary.

I.

Scope of Review.

II.

The Court Erred in Failing to Consider the Availability of Assistance Other Than the NORTH QUEEN to the PIONEER.

Assignments of Error applicable:

- A. There Was Assistance Other Than the NORTH QUEEN Available to the PIONEER: the SUNLIGHT Was Standing by; San Pedro Was Close.
- B. Availability of Other Assistance Is a Highly Material Factor.
- C. The Availability of the Assistance Was Not Considered.

III.

The Lack of Consideration of the Lack of Danger to the NORTH QUEEN.

Applicable Assignments of Error:

- A. The Situation With Respect to Consideration of Danger to the Salvor.
- B. The Lack of Danger to the Salvor.
- C. Lack of Consideration or Failure to Appreciate the Significance of lack of Danger to the Salvor is Cause for Reduction of the Award.

IV.

The Court Erred in Failing to Consider That the PIONEER Might Be Able to Free Herself in the Rising Tide. The Court Apparently Mistakenly Concluded That She Could Not Free Herself.

Assignments of Error applicable:

- A. The PIONEER'S Ability to Free Herself.
- B. The Potential Ability of the Pioneer to Free Itself Was Material.
- C. The Ability of the PIONEER to Free Herself Was Not Recognized as a Factor in Determining the Award.

V.

The Court Erred in Failing to Consider the Lack of Expense to the Salvor.

Assignments of Error applicable:

- A. The Labor and Expense of the Salvor Is a Material Factor.
- B. Lack of Expense to the Salvor Was Not Considered; on the Contrary, It Was Assumed That the Salvor Suffered a Loss of Fish.

VI.

The Court Placed Overweening Emphasis on the Skill of Appellee.

Assignments of Error applicable:

- A. Skill Appears to Have Been the Principal Factor Upon Which the Award Was Based.

VII.

The District Court Erred in That It Granted an Award Which Departs From the Path of Authority and Is Palpably Excessive.

- A. An Award Which Is Palpably Excessive, and Which Departs From the Path of Authority, Will Be Reduced.
- B. This Award Exceeds Those Which Have Been Customary for Like Services.

Conclusion.

I.

Scope of Review.

We are urging two types of error on this appeal:

First, we are contending that the trial court erred in the standards applied to determine the amount of the award, and

Second, that the award is manifestly excessive in view of the service rendered.

These contentions, of course, raise different problems. If this Court agrees with us that the trial court omitted, in determining the award, to consider material factors in our favor, including the fact that assistance other than the NORTH QUEEN was available, and considered to our detriment various legally immaterial factors, any initial presumption as to the correctness of the trial court's judgment will then be gone, and the question will be simply one as to how much the judgment should be modified.

The Loch Garve (C. C. A. 9th), 182 Fed. 519;

Rodriguez v. Bagalini (The Mary Pigeon) (C. C. A. 9th), 1927 A. M. C. 634, 17 F. (2d) 921;

The West Harshaw (C. C. A. 2d), 1934 A. M. C. 360, 69 F. (2d) 521.

Thus in the *Mary Pigeon* case, this Court stated (at p. 922):

"It is the settled rule that an appellate court is reluctant to disturb an award for salvage and does so only in cases where it is based on erroneous principle or misapprehension of the facts or is grossly excessive or inadequate. *Connemara*, 108 U. S. 352. Following that rule we should be disposed to affirm

the award of the court below were it not for the fact *that certain features of the case which we think should have received primary consideration seem to have been disregarded.*" (Italics ours.)

In that case bad faith on the salvor's part had been disregarded, and the award was therefore cut from \$1,700 to \$500. In the present case, the availability of assistance from San Pedro, and assistance from the SUNLIGHT, which was standing by, were totally disregarded, and the case treated as if the salvation of the PIONEER wholly depended on the skill of the NORTH QUEEN. This likewise is one of the factors which under the cases "should have received primary consideration." We believe there were other serious errors of equal dimensions.

With respect to our second contention, that the award is manifestly excessive, it will no doubt be emphasized by our opponents that an appellate court is "reluctant" to disturb the award of the District Court unless it is "clearly . . . inappropriate." (*Simpson v. Dollar* (C. C. A. 9th), 109 Fed. 814.)

The fact that the award must be clearly inappropriate, however, obviously does not preclude relief where it is clearly inappropriate. Nor is that general statement of a great deal of assistance in determining *when* an award is clearly inappropriate. *Simpson v. Dollar, supra*, relies in generally stating this rule on *The Bay of Naples* (C. C. A. 2d), 48 Fed. 737, in which, in this behalf, it is said (at pp. 738-739):

" . . . Although the amount to be awarded as salvage rests, as it is said, in the discretion of the court awarding it, appellate courts will look to see if that discretion has been exercised by the court of first instance in the spirit of those decisions which

higher tribunals have recognized and enforced, and will readjust the amount if the decree below does not follow in the path of authority, even though no principle has been violated or mistake made.”

We have little doubt that we shall be able to satisfy the Court that in this case the decree “does not follow in the path of authority . . .” That a salvage award will be modified which departs from “the path of authority” likewise is expressly stated in the more recent case of

Canadian Government Merchant Marine Ltd. v. United States (C. C. A. 2d), 1925 A. M. C. 765, 769; 7 F. (2d) 69.

And, in

The Wahkeena (C. C. A. 9th), 1932 A. M. C. 556, 56 F. (2d) 836,

this Court apparently followed the same principle, since it reduced a judgment giving a moiety of the value of the salvaged vessel in circumstances not heretofore held to justify such an award.

We shall explore the cases dealing with these rules more fully in connection with the particular errors we urge. We desire for the present merely to point out that to the extent that there are actual errors in the standards applied, the traditional reluctance of an appellate court to reconsider a salvage award disappears, and that, further, despite such reluctance, if the award goes substantially beyond those traditionally allowed for like services, an appellate court will in any event intervene to correct it.

II.

The Court Erred in Failing to Consider the Availability of Assistance, Other Than the North Queen, to the Pioneer.

Assignments of Error applicable:

XVI. That the Court erred in that it did not find or consider in determining the award that the PIONEER was close to port where further assistance could have been obtained.

XVII. That the court erred in that it did not find or consider in determining the amount of the award that the NORTH QUEEN was exposed to little or no danger in assisting the PIONEER.

A. There Was Assistance Other Than the North Queen Available to the Pioneer; The Sunlight Was Standing by; San Pedro Was Close.

This is a case in which twelve thousand dollars, over ten per cent of the salvaged value of the assisted craft, was granted for an hour and a half's assistance, in calm weather, on a rising tide, to a craft not proved to be herself helpless, which afterwards made port under her own power. There were no circumstances of special danger, hardship or heroism to the assisting craft. We believe so high an award would not have been granted, in the absence of fundamental errors in the standard applied. One such error was that the PIONEER was treated as if helpless in remote seas, where, if the succor offered by the appellee were not effective, certain destruction would have been the fate of the PIONEER.

But libelant's boat, the NORTH QUEEN, was neither the first nor the only boat to offer assistance to the PIONEER. When the PIONEER sent out its distress signal, the testi-

mony of Captain Marion Joncich shows that the PIONEER got, not the NORTH QUEEN, but the SUNLIGHT on its radio [A. 170, 171]. The testimony of John Joncich, master of the SUNLIGHT (not related to Marion Joncich, the master of the PIONEER [A. 224]), also is that he received the distress signal of the PIONEER and directed the PIONEER to spin its searchlight in the air and went to its assistance [A. 24, 25]. Due, however, to the fact that the NORTH QUEEN was apparently closer to the PIONEER, the NORTH QUEEN arrived first. The NORTH QUEEN seemingly did not make any answer by radio to the distress signal of the PIONEER, but went directly to its location.

By the time the SUNLIGHT arrived, the NORTH QUEEN had taken a line and was pulling against the PIONEER [John Joncich, A. 26]. The SUNLIGHT then offered to take a line from the PIONEER [John Joncich, A. 28] and shortly before the time the PIONEER came off, had taken a Manila line from the PIONEER, to be used in pulling a towing wire to it [Vincent Zuanich, A. 182; Paul Tipich, A. 184].

The SUNLIGHT was a Diesel fishing boat with a 250 h.p. engine [John Joncich, A. 24], which is slightly less than the 300 h.p. of the NORTH QUEEN's engine [Berry, A. 148]. The SUNLIGHT was ready, willing and able to assist. In this behalf, John Joncich testified [A. 34]:

“Q. Did you have any line aboard that would have been suitable for assisting the PIONEER? A. I did. I had a 5/8ths inch cable.

Q. How long? A. Oh, I had about 450 feet.

Q. Did your boat have a towing bitt? A. It has a regular towing bitt.

Q. Located where? A. Amidships, behind the pilot house.

Q. In your opinion, from your familiarity with the SUNLIGHT, was she capable of rendering assistance to the PIONEER in pulling her off the strand?

A. We were." [47]

"Q. In standing by were you doing so in order to render assistance, if any assistance was requested by the PIONEER? A. We were standing by, yes.

Q. You were standing by for that purpose? A. Yes. If one boat couldn't pull him off, the two of us might."

It may also be noted that Laguna Beach is about thirty miles from San Pedro [John Joncich, A. 24]. The Court may take judicial notice of the fact that San Pedro is a major port, at which large tugs and salvage equipment is available.

B. Availability of Other Assistance Is a Highly Material Factor.

That availability of other assistance is a material factor, and one which the Court is required to consider, there can be no doubt. In this Circuit, there are at least two cases in which that factor has been dealt with. The earliest is *The Monticello* (D. C., N. D. Cal.), 81 Fed. 211, in which the Court stated (at p. 214):

" . . . That other assistance was then near at hand is, as stated, clearly established by the testimony. The effect of this proof is, of course, to reduce the merit of the services rendered by the San Benito. It is always considered by courts of admiralty an important element in fixing the compensation to be awarded. *The Suliote*, 5 Fed. 99; *The O. C. Hanchett*, 22 C. C. A. 678, 76 Fed. 1003; *The H. B. Foster*, Fed. Cas. No. 6,290; *The Saragossa*, *Id.* 12,334. The port of San Francisco was about 100 miles away.

Powerful, swift, and thoroughly equipped tugboats were there, ready at a moment's notice to respond to the call for a tow,—particularly to a vessel in a disabled condition.”

In that case \$350 was allowed as salvage, for seven to eight hours' towing of a disabled vessel valued at \$12,000. The assisting craft was valued at about \$425,000 and ordinarily earned between \$600 and \$700 a day.

In the present case, instead of being 100 miles from San Francisco, the PIONEER was 30 miles from Los Angeles—likewise a major port where salvage equipment is at all times available.

In the case of *The Wahkeena* (C. C. A. 9th), 56 F. (2d) 836, 1932 A. M. C. 556, this Court made the following statement (at p. 558):

“Aside from the conflicts in the testimony already noticed, there are two other material questions concerning which the parties are in sharp disagreement:

“1. What would have been the WAHKEENA's chances of saving herself had she not been rescued by the CUDAHY?

“2. Were other tugs available to the WAHKEENA at the time the CUDAHY came alongside?

“*Since both of these matters go to the value of the appellee's services, we will give them some brief consideration. (Italics ours.)*

“1. The appellant contends that there were at least 18 other tugs available to assist the schooner, and there is some testimony to support this assertion. On the other hand, there is ample evidence that the JOHN CUDAHY was ‘considered the strongest bar tug there’ and that few, if any, of the craft suggested

by the appellant would have been able to find the WAHKEENA in the thick fog, or would have been able to tow her back if they had found her.”

In this case the WAHKEENA was stranded on the jetty at Grays Harbor and was pounding in a strong tide. The tugboat JOHN CUDAHY pulled her off, pumped her out, and towed her back to the Aberdeen docks. Both the WAHKEENA's boilers were out and she was without steam, was helpless on the jetty, and she was leaking. The CUDAHY together with the TYEE, another tug owned by the libelant in the case, and a third tugboat towed the WAHKEENA back to the Aberdeen docks. The assistance occupied a period of upwards of 19 hours. An award of \$8,162.50 was made by the trial court, which was reduced on appeal to \$5,000.

The case is not comparable on its facts to our own, due to the much more extensive services rendered, the greater danger in the position of the WAHKEENA, and the unavailability of other assistance. It does, however, establish plainly that availability of assistance is a factor which must be considered.

In *Societa Commerciale Italiana Di Navigazione v. Maru Nav. Co.* (C. C. A. 4th), 280 Fed. 334, cert. den. 259 U. S. 584, 42 S. Ct. 586, the same principle was recognized in the Fourth Circuit. In that case the Italian steamship TEA, valued at \$370,000, grounded in the Mediterranean. She was pulled off, after 39 hours' labor, by the American steamship ST. CHARLES. The trial court granted an award of \$34,000, stating, in partial support of

the award, that no other assistance was available (271 Fed. at 103). The Fourth Circuit reduced the award to \$20,000, stating (at p. 337):

“Moreover, it can hardly be said that the St. Charles was the only source of relief, since other vessels were passing at no great distance, from one or more of which the needful aid might have been procured.”

In the present case, there were not only other vessels *passing* by, there was another vessel *standing* by.

De Aldamiz v. Th. Skogland & Sons (C. C. A. 5th), 17 F. (2d) 873, is comparable to the present case, both as respects the values of the ships and the degree of danger involved. In that case the PER SKOGLAND, valued at \$60,000, stranded on the bar of the port of Frontera, Mexico. She was pulled off in about 1 hour and 30 minutes by the RAJAH, valued at \$150,000. There was no immediate danger in the position of the PER SKOGLAND, but severe storms were of common occurrence in the particular season. The Fifth Circuit Court of Appeals increased the award from \$750 to \$5,000, stating (at p. 874):

“. . . That danger was enhanced by the lack of tugs equipped to render salvage service, though there was also the chance that a steamer able and willing to do so might come to the rescue. The evidence is far from being convincing that any of the other three ships in the vicinity of Frontera was capable of saving the ship in distress, or was willing to take the risk of doing so.”

In the present case the value of the vessel salvaged is about \$112,000 in contrast to \$60,000 for the vessel salvaged in the *De Aldamiz* case. The value of the salving

craft was, however, substantially greater than that of the NORTH QUEEN. The operation in the *De Aldemis* case required very careful maneuvering, apparently in difficult waters, to avoid stranding the salving vessel, while the present case did not involve any particular difficulty. In that case there was no one in the harbor ready to assist, whereas in the present case there was another boat of nearly equal power standing by. In that case the nearest tugs were at Tampico, more than three hundred miles away—in the present case they were certainly available in San Pedro—thirty miles, less than three hours away, for a fast tug. In the present case it had not yet been established whether the PIONEER could free herself, on the rise of tide, by jettisoning stores and fuels, by her own efforts. In the *De Aldemis* case it was clear that the PER SKOGLAND was helpless. If in that case the *unavailability* of other assistance called for an increase in the award from \$750.00 to \$5,000.00, the *availability* of such assistance in our case would require a reduction to something substantially below that \$5,000.00 figure.

In *The John J. Howlett* (District Court, E. D. Pennsylvania), 256 Fed. 971, it is said (at p. 972):

“Another feature of importance is the presence or absence of other promise of assistance than that rendered. Many of the elements which enter into an award of salvage compensation or allowance are difficult of admeasurement.”

In *The Livietta* (C. C. A. 5th), 242 Fed. 195, it is said (at p. 208):

“. . . It is to be remembered, however, that she was on an ocean path that was constantly used by

vessels from which she could have received help. The danger was not of that character which would have existed if she had been far out at sea, or in waters rarely used."

In *The Peru* (E. D. Pa.), 99 Fed. 783, it is said (at p. 785):

" . . . Turning, then, to the case before the court, and bearing in mind the facts above set forth, I have no doubt that, if the Peru had not been towed away at the time when that service was performed, she would have been either destroyed or seriously damaged. But it is equally clear that the Lincoln was not indispensable. If she had not been there to render the service, the King would have performed it without delay. The Lincoln herself was at no time in danger, and the work she did was not of an extraordinary character."

Other cases holding that the availability of other assistance is material, are:

The High Cliff (C. C. A. 2d), 271 Fed. 202;

Cuyamel Fruit Co. v. Bostrom (C. C. A. 5th), 19 F. (2d) 10 (cert. den. 275 U. S. 544, 72 L. Ed. 417, 48 S. Ct. 83);

The Roman Prince (D. C., S. D. N. Y.), 88 Fed. 336;

The Marie (D. C., E. D. N. Y.), 39 Fed. 501;

The Plymouth Rock (D. C., S. D. N. Y.), 9 Fed. 413;

The Santa Barbara (C. C. A. 4th), 299 Fed. 152.

C. The Availability of Such Other Assistance Was Not Considered.

There can be no question that the availability of assistance other than the NORTH QUEEN was a material factor in determining the award to which the NORTH QUEEN was entitled. The cases cited above are conclusive on this question. There can likewise be no question that other assistance was available. Not only was the situation one where, as in *The Monticello*, *supra*, thoroughly equipped tugs were available within far less than 100 miles, or, as in the case of THE TEA, other vessels were in the neighborhood which could be called upon, but the situation was one where another vessel was standing by and had actually commenced preparations to take a line on board.

There can likewise be no doubt that this factor was not considered in determining the amount of the award. The opinion of the trial court, and the findings, are inconsistent with the possibility that the availability of such assistance might have been considered.

The findings, of course, are required by the rules of the Supreme Court to contain the material facts upon which the trial court based its decision. (Admiralty Rule 46½.) There is no mention of the presence, the availability, or the offer of assistance by the SUNLIGHT in the findings. So far as the findings are concerned, the case is one involving the sole activity and sole presence of the NORTH QUEEN. The assumption which must necessarily be drawn from the findings, that the case was considered as one in which the NORTH QUEEN was the only vessel available, is borne out by the oral opinion of the court [A. 49-55].

In that opinion, the Trial Judge discussed factors on which he relied in making the award. He makes no mention of the *SUNLIGHT*; no mention of the offer of assistance, no mention of the availability of other assistance. On the contrary, the case is treated purely as one where the *NORTH QUEEN*, with some assistance from the tide, saved the *PIONEER* from likely destruction. He states [A. 52]:

“ . . . I think the major factor was the maneuvering of the vessel, the salvor, and that had it not been for that movement the consequences that ensued to the disabled vessel might have been very serious. How serious I think is a pure matter of conjecture.”

We repeat his words:

“ . . . the major factor was the maneuvering of the vessel . . . —*had it not been for that movement the consequences that ensued to the disabled vessel might have been very serious.*”

These words show that the situation in the court's mind was one where, if the *NORTH QUEEN*'s efforts failed, the *PIONEER* was very probably lost. There is certainly no consciousness here that there was another vessel ready to take a line so that “if one boat couldn't pull him off, the two of us might.” [Testimony of John Joncich of the *SUNLIGHT* [A. 34].]

We do not think that one need go far to understand how this could happen. The testimony of the master, engineer and one fisherman on the *SUNLIGHT* was taken by deposition. The depositions were not raised in court, but, in order to expedite the trial, placed in evidence on the

understanding that they were to be considered by the court [A. 223]. It is not surprising that the cold print of the depositions would have impressed itself less vividly on the court's mind than the testimony of the witnesses who actually testified in open court, for at the trial the SUNLIGHT received relatively brief mention. It is well established that, to the extent that a case is controlled by testimony given by depositions, it comes before the appellate court *de novo* in admiralty.

Whatever may be the explanation, it seems transparently clear that the availability of the SUNLIGHT's assistance was given no weight in the determination of the award.

In the case of *The Tea*, *supra*, an award was decreased substantially by the Fifth Circuit Court of Appeals for such failure.

In *The De Aldamiz* case, an award was increased, in part, by reason of failure to consider that other assistance was not available.

In the case of *The Wahkeena*, *supra*, this court expressly recognized that such is a material factor in determining the award.

We submit, therefore, that since this factor was not considered in this case, such error is cause for a reduction of the amount of the award. And the reduction, we submit, should be substantial, for the quoted language from the court's opinion shows that failure to consider this factor resulted in an entire misapprehension of the significance of the assistance of the NORTH QUEEN.

III.

The Trial Court Erred in Failing to Consider the Lack of Danger to the North Queen.

APPLICABLE ASSIGNMENTS OF ERROR.

XVII. That the court erred in that it did not find or consider in determining the amount of the award that the NORTH QUEEN was exposed to little or no danger in assisting the PIONEER.

XI. That the court erred in that it did not find or consider in determining the award, that the assistance rendered by the NORTH QUEEN was rendered without substantial peril to, expense to, or sacrifice by the NORTH QUEEN, her master or crew.

A. The Trial Court Did Not Consider Lack of Danger to The Salvor as a Factor in Decreasing the Award.

There were no findings made that the NORTH QUEEN incurred any risk in salving the PIONEER. The findings rest the award exclusively on the skill of the appellee, the supposed danger of the PIONEER, and the respective values of the vessels. There is, however, a mention of this factor in the oral opinion of the Trial Court. It is stated [A. 50-51]:

“She responded to the call, and in doing so, while probably not placing herself in a great peril on account of the distance separating the two vessels at the time of the first movement, there was a good deal of danger to be apprehended in going close to the obstacles in the pathway, which had caused the (70) ‘Pioneer’ to become fixed on the rocks.”

In concluding, the Court further stated [A. 54-55]:

“It was the maneuvering of the vessel in a way to give leverage so that the greatest amount of beneficial force could be used on the disabled vessel, and at the same time taking proper precautions to not submit the salvor to an unusual risk. It is those two features which I think bring the case up into the dignity of a high degree of skill.”

These words, it seems to us, establish that the findings correctly represent the factors considered by the Court, and that the lack of danger to the NORTH QUEEN was not weighed as itself a major factor in *decreasing* the amount of her award, but instead was considered merely as a phase of the question of skill and apparently treated as a reason for *increasing* her award! The salvor's skill is the only factor mentioned in the findings other than danger to the PIONEER, and apparently the only other factor given any real weight.

We have hesitated to go into the oral opinion of the Trial Court in this connection, because it seems to us to be plain that the factors considered in fixing the award must, as a matter of law, be discovered in the findings. But we have set them forth because we feel that in this important phase of the case, this Court would wish to know that the practically exclusive emphasis on skill in the findings was not any mere inadvertence, and that in fact skill was the sole basis for high award. If the Court finds the oral opinion ambiguous, the findings, of course, must be the ultimate test as to the factors upon which the award is based, as to the justifiability thereof.

B. The Lack of Danger to The Salvor Is Clear From the Record.

Due to the length of the line separating the PIONEER from the NORTH QUEEN, the NORTH QUEEN was not required to approach closely to the obstacles which had fixed the NORTH QUEEN. When the NORTH QUEEN first approached the PIONEER, the skiff from the PIONEER took to the NORTH QUEEN about 200 to 225 fathoms of line [A. 181, 171]. There was no substantial bight in the rope because it floated on the kelp between the boats [A. 182]. This was used to pull about 200 fathoms of steel wire to the NORTH QUEEN. A fathom is 6 feet, and there would therefore seem to have been no occasion for the NORTH QUEEN to have approached much closer than 1,200 feet from the PIONEER. This she did cautiously.

The weather was calm; there was only a gentle swell, which imparted to the PIONEER "a slight rocking motion" [Matt Berry, A. 133]. More ideal conditions for such an operation could hardly be imagined.

Since the line was brought out by the PIONEER to the NORTH QUEEN, the PIONEER itself protected its salvor from any risk which might arise from a too close approach. There are many cases in which substantially similar maneuvers have been described as essentially without serious risk.

The Tordenskjold (C. C. A. 5th), 255 Fed. 672;

Societa Commerciale Italiana Di Navigazione v. Maru Nav. Co. (C. C. A. 4th), 280 Fed. 334;

The Hesper (D. C. E. D. Tex.), 18 Fed. 692, award reduced, 18 Fed. 696, aff'd 122 U. S. 256, 7 S. Ct. 1177;

The Lucia (D. C. S. D. Fla.), 222 Fed. 1015.

Clearly, therefore, the NORTH QUEEN incurred no substantial danger. Moreover, the NORTH QUEEN was equipped with a fathometer [A. 116], and the testimony of the master of the SUNLIGHT [A. 28] was that by the use of this device it is possible continuously to ascertain the amount of water beneath the keel of the subject vessel. The SUNLIGHT was alongside the PIONEER and had about 5 fathoms of water beneath her bottom [A. 27].

When these cases (which hold that mere pulling against a stranded vessel in calm waters is not in itself a dangerous activity), were decided, this device was not in use. A boat so equipped can hardly be in greater danger than were the vessels in these cases.

There was some effort made to show the rigging of the NORTH QUEEN was in danger as a result of its possible collapse from the strain imposed when the line from the PIONEER broke. However, the mast itself was supported by a 1-inch to $\frac{7}{8}$ -inch steel wire [A. 123], and the boom was held to the mast by four $3\frac{1}{2}$ -inch Manila lines [A. 123]. It is uncontradicted that both the wire supporting the mast and the lines supporting the boom were of greater strength than the wire from the PIONEER to the NORTH QUEEN itself, which was only a $\frac{5}{8}$ -inch steel wire and which was old and somewhat rusted [A. 211]. There was likewise uncontradicted testimony that should any portion of the rigging of the NORTH QUEEN give, the first to go would be the topping lift (the manila lines) holding the boom aloft [A. 212]. The value of the boom was only about \$300.00, including labor for repairs [Scheibe, A. 212], and there was no evidence that anyone was in a position to be injured if it fell. And indeed the sug-

gestion that there was such danger to the rigging is after all sheer speculation, for the line to the PIONEER did break and there was in fact no damage to the rigging.

It was expressly testified by libelant that there was no danger of fouling the NORTH QUEEN in the course of the salving operation [A. 128].

To sum up, there was no unusual danger to the NORTH QUEEN.

C. Lack of Consideration or Failure to Appreciate the Significance of Lack of Danger to Salvor Is Cause for Reduction of the Award.

That danger to the salvor is a material factor, indeed probably the most important single factor in determining the award, is established by so many cases that we hesitate to cite any. Some of these cases are, however, so comparable in their facts as to be most enlightening, and we shall concentrate on these in order to avoid merely belaboring the obvious.

In the case of *The Miskianza* (C. C. A. 2d), 1928 A. M. C. 1332, 27 F. (2d) 734, the tug ST. HELIERS, valued at \$100,000, freed the tanker MISKIANZA, valued at over \$600,000 with cargo, from a strand. The tug was obliged "to poke about at night in very contracted waters in a strong current." She was in danger both from submerged rocks and a rock jetty. She was pulling and maneuvering in these waters for about eight hours, and suffered damage in the process. The trial court awarded \$6,500, which on appeal was increased to \$12,500, plus cost of repairs, the Court stating:

"Nevertheless, for reasons already stated, we think there was more danger to the salvor than the trial judge conceded, and therefore, in view of the suc-

cess of the undertaking and the value salvaged, the award should be increased to the sum of \$12,500, in addition to the cost of repairs."

It is worth noting that in that case the values were almost six times those involved in the present case, the labor four times as great, the danger to the salvor incomparably greater. Yet appellee claims the same reward.

In the case of *The Tordenskjold* (C. C. A. 5th), 255 Fed. 672, the vessel of that name, a Norwegian steamer valued with cargo at about a million dollars, stranded on the Florida coast. The tug TAGGART BROTHERS, valued at about \$85,000, reached the vessel between 7 and 8 o'clock in the evening on October 27, five days after she stranded, and pulled for something like 3 hours without success. On the following morning she left to take care of certain barges for which she was responsible, with the consent of the master of the TORDENSKJOLD, and returned on the 29th. At this time she pulled the TORDENSKJOLD off.

The District Court describes the TORDENSKJOLD as having been aground on a reef. It found that it was not possible for the TORDENSKJOLD to free herself by jettisoning cargo, due to lack of steering room if she did float. It stated that (p. 673):

"There can be no question that any ship ashore on the Florida Reefs, exposed as this one was to the full force of the sea during the months of September and October, is in great peril."

The District Court awarded \$40,000. On appeal the award was reduced to \$10,000. The court stated (at pp. 674-675):

". . . The value of the property saved made it proper to award more than should have been awarded

if that value had been greatly less. But the award should be materially less than it properly might have been *if the service rendered had involved great peril or serious loss or damage to the tug or its equipment or tows, or grave danger, heroic effort, or unusual hardships to its officers or crew. The amount of the award made indicates that undue weight was attached to the value of the property saved, and that there was a lack of due consideration of the absence of such attending circumstances as would justify the liberality evidenced by the decree.* In view of the value of what was saved and of that employed in the rescue, of the time, labor, and expense involved in the service, and of all the attending circumstances, our conclusion is that the amount that should be awarded is \$10,000, instead of \$40,000, the amount awarded by the decree appealed from. That decree will be here modified, as just indicated, and, as so modified, it is affirmed, with costs against the appellees."

There we have a vessel stranded as was this one. Its peril was the same as the peril presented here, that, if present fine weather ceased, the action of the seas would destroy the stranded ship. Unlike the present case, there was no possibility of the salved vessel freeing herself. The period of service exceeds anything involved in this case, and, so far as appears, there was no other assistance available. If the lack of danger in that service brought the award down to \$10,000, where the value is so much greater (nearly ten times that in our case), the need so much clearer, the labor so much more substantial, where also there was no other assistance available, how can it be contended that a \$12,000 award may be sustained here?

The old case of *The Hesper* (D. C., E. D. Tex.), 18 Fed. 692, modified by the Circuit Court, E. D. Texas, 18

Fed. 696, is virtually an exact analogue in so far as the value salvaged is concerned, though the service rendered substantially exceeded in work and labor that in this case. In this case the *HESPER*, of the value of \$100,000, with a cargo valued at \$6,500.00, grounded in the Gulf. She was assisted by three tugs valued at \$35,000 over a period of three days. It was found that the prevailing winds on that shore were sometimes of great violence, but that during the period involved there was no wind or sea of any special danger, and that the services were not attended with any special hazard. The District Court awarded \$8,000 which, on appeal, was reduced by the Circuit Court to \$4,200. The Circuit Court, on appeal, stated, at page 699:

“Various points were urged in argument to increase the salvage,—that the wreckage service should be encouraged; that storms might have come that would have destroyed the vessel; that the salving tug injured herself in tugging at the ship salvaged, etc. It is true that all encouragement should be given to mariners, ships, and landsmen to save property imperiled on the high seas, but where there is no chance for the exercise of gallantry, heroism, or risk, why should an already distressed and imperiled ship be subject to pay additional expense for ordinary services, and these expenses be chargeable solely to her calamity?”

The values of the assisting tugs, it is true, were less in *The Hesper* case than the value of the salvor here. But, the value of a salvor not in danger is not to be considered, except in so far as its earnings were lost, and this, therefore, would not seem material. *The Livietta* (C. C. A. 5th), 242 Fed. 195, 205.

The salvors in *THE HESPER* were somewhat less ready to assist than was libelant in this case, and rather more deliberate about doing so, but, on the other hand, they spent a great deal more time, and there was some evidence before the court that they would have earned about half as much as they were awarded, had there been no award. There is no like evidence in this case. It was found that the *HESPER* was hardly likely to be able to free herself. No such finding exists in this case, and one could not be supported. It seems to us that, taken as a whole, the circumstances of dissimilarity between the cases more than cancel out, that certainly no greater award would be justified in this case than in *The Hesper*. In fact it seems clear that the award should not go as high.

The Hesper, as modified by the Circuit Court, was affirmed in 122 U. S. 256, 257, 7 S. Ct. 1177.

In *Ulster S. S. Co. v. Cape Fear Towing & Transportation Co.*, 94 Fed. 214 (C. C. A. 5th), the *TORR HEAD*, of a value of \$300,000, was freed from a strand on Frying Pan Shoals of the North Carolina Coast by three tugs of relatively small value. Each spent between nine and twelve hours, over a two day period. The District Court awarded \$13,000, which on appeal was reduced to \$6,500, lack of any extraordinary danger or hardship to the salvor being emphasized, together with some misapprehension by the trial court as to the danger of the stranded vessel.

In *The Santa Rosa* (C. C. A. 4th), 5 F. (2d) 478, it is said at p. 481:

“In determining the award in a salvage case the main consideration is danger to the lives of the salvors, and next to their boats and property. In this case there appears to have been no imminent dan-

ger to the lives and boats of the salvors, other than that incident to their vocations, the danger incident to the danger of gaining a livelihood on the seas.”

In *The Lucia* (D. C., S. D. Fla.), 222 Fed. 1015, the vessel of that name was stranded on a sand bar off the Florida coast. She was valued at \$300,000. She was in a serious danger should a heavy wind from the northwest or southerly direction arise. The *CONEY*, valued at \$30,000, assisted the *LUCIA* to jettison cargo, and thereafter, the ship also using its own means, pulled the vessel off. About two days’ services were involved. The Court stated at p. 1017:

“I find that the service rendered by the tug was salvage, but of the lowest grade. There was no risk of property, peril to life or limb, unusual expense, gallantry, courage or heroism. The *Hesper Case*, 122 U. S. 256, 7 Sup. Ct. 1177, 30 L. Ed. 1175.

“The Supreme Court in *The Blackwall*, 10 Wall. 1, 19 L. Ed. 870, lays down the rule for fixing compensation in salvage cases:

- (a) Labor expended by the salvors in rendering the salvage service.
- (b) The promptitude, skill, and energy displayed in rendering the service.
- (c) The value of the property employed by the salvors, and the danger to which it is exposed in the service.
- (d) The risk incurred by the salvors in saving the imperiled property.
- (e) The value of the property saved.
- (f) The degree of danger from which the property is saved.

“As before stated, I cannot find from this testimony any great degree of danger to the property used by the salvors nor to the persons employed in the service. The property saved, the LUCIA, was in a certain amount of danger, for, as has been well said, ships are intended to float, and when one goes aground there is always danger attendant. She is out of her element. The LUCIA was in danger, therefore, and I think the service rendered by the CONEY was more than mere towage service. But I fail to find in this case the elements that would authorize a large award for the service rendered.”

The Court awarded \$4,000 for the service. It may be noted that this is closely comparable to the allowance made in *The Hesper* Case. The cases heretofore cited in which larger awards were made all involved far greater valuations and services.

We could continue to set out cases asserting the same proposition in great length. There is no necessity of our doing so, because it cannot be denied that the danger to the salvor (or, as in our case, the entire lack of it) is a highly significant factor. The manner in which this factor is referred to in the Court's oral opinion shows that it was treated merely as a phase, probably a minor phase, of the skill of the salvor, and any doubt that may exist in this respect from the opinion is wholly eliminated by the findings, which do not even mention the question. This is a factor which should have received primary consideration, and a substantial modification of the award would therefore seem to be required.

Rodrigues v. Bagalini (The Mary Pigeon) (C. C. A. 9th), 1927 A. M. C. 634, 17 F. (2d) 921.

IV.

The Court Erred in Failing to Consider That the Pioneer Might Be Able to Free Herself in the Rising Tide. The Court Apparently Mistakenly Concluded That She Could Not Free Herself.

ASSIGNMENTS OF ERROR APPLICABLE.

“III. That the court erred in not finding and not considering in determining the award that the PIONEER stranded very shortly (85) after low tide; that when the PIONEER was stranded the waterline at her bow was approximately one foot out of water and the waterline at her stern about even with the water; that the weather was calm and that there was approximately a 5-foot rise of tide to be anticipated; that the PIONEER was not pounding or leaking and her means of propulsion were entirely sound and that it was likely that without assistance she would have succeeded in freeing herself before high tide on the night of her stranding.

IV. That the court erred in that it did not find and did not consider in determining the award that it was likely that the PIONEER would free herself without assistance, except the assistance of the rising tide.

V. That the court erred in finding and in considering, in determining the award, that the PIONEER was stranded on the rocks in such a manner as to be in great peril from the sea and elements.

VI. That the court erred in that it did not find, and did not consider in determining the award that the PIONEER was not in immediate danger, but would have been in more serious danger if the weather took a change for the worse.”

A. It Is Highly Probable That the Pioneer Could Have Freed Herself With the Rising Tide.

The evidence shows without dispute that after the PIONEER stranded, she attempted to back off, unsuccessfully. She then stopped her engines, which, however, were still in working order. In fact, when she pulled free, she went back to San Pedro under her own power, without escort [A. 177]. She was not leaking [A. 177].

It shows further that the PIONEER struck at approximately 6:30 p. m., about an hour after low tide, and that high tide would have been about midnight, or six and one-half hours after low tide, and five and one-half hours after the PIONEER struck. It is an elementary physical fact, of which the Court may take judicial notice, that there is relatively little flow of tide at the extreme ebb and at the extreme high tide. There was a 5-foot rise in tide to be expected, and very little of it could have occurred when the PIONEER struck.

Two members of the crew of the PIONEER went forward in a boat to take the anchors of the PIONEER from the bow of the PIONEER. The anchors were to be used in an attempt to pull the PIONEER off. Their testimony was that the waterline at the bow of the PIONEER which, according to undisputed testimony, is ordinarily about six inches out of water [Xitco, A. 83], was then about a foot out of water.

Vincent Zuanich testified [A. 180]:

“Q. When you were at the bow, did you see how far above the water level the water line of the PIONEER was? A. Maybe one foot.”

Paul Tipich testified [A. 183]:

“Q. Did you go forward with Mr. Zuanich in the skiff? A. Yes, I did.

Q. Did you see where the water line of the PIONEER was with relation to the surface of the water? A. Yes, it was about a foot above water.”

In this testimony, it seems to us that there could be no question that the PIONEER would have floated free before high tide.

This testimony was, however, contradicted. Mr. Xitco testified that the waterline at the bow of the PIONEER was four to five feet out of water at the time of the arrival of the NORTH QUEEN [A. 82]. Mr. Berry, who was on the NORTH QUEEN, testified that the bow of the PIONEER was three to four feet out of water when the NORTH QUEEN arrived [A. 132]. This testimony was unique. It seems to us that there are three very good reasons why this testimony cannot be accepted on this point. The first is that these witnesses were hundreds of feet away observing at night by the light of a searchlight. It is impossible to conceive how they could have made an observation of this sort with any degree of accuracy at all.

In the second place, Mr. Xitco's testimony is that the level of the water at the waterline on the bow of the PIONEER was just about the same when the NORTH QUEEN first came in as when she pulled against the PIONEER immediately before the PIONEER came off [Xitco, A. 127]—this, despite a rising tide. Such testimony can hardly be entitled to any credit.

In the third place, both the experts in the case—Captain Varnum, who was representing appellee, and Captain Scheibe, who testified on behalf of appellants—testified

that if the PIONEER was hard aground with her bow waterline three to five feet out of water, she could not have been pulled off by a vessel the size of the NORTH QUEEN pulling against a 5/8" wire.

Captain Varnum was asked on cross-examination [A. 162]:

"Q. In your opinion, assuming a vessel of around 170 tons on the rocks along the full length of her keel, with her bow 3 to 5 feet out of water, when the vessel was only pulling against a 5/8-inch steel wire, do you think such a vessel pulling on such equipment can pull such a ship off the strand?"

After objection, he answered [A. 163]:

"A. I don't know, because if she was hard aground like that, he couldn't pull her out with a 5/8-inch wire."

Since the PIONEER did in fact come off merely by pulling on a 5/8-inch steel wire, the conclusion seems incapable that the PIONEER was not high and dry as Mr. Xitco and Mr. Berry testified, but was pretty much in the position that the men best able to observe state, that is, that when she struck the waterline was about a foot or so out of water.

Captain Scheibe testified in this behalf as follows [A. 207]:

"Q. In your opinion, Captain Scheibe, if the PIONEER went hard aground at between 6:30 and 7:30, and her bow was from three to five feet—her water line was from three to five feet out of water, could a fishing vessel with a motor of 300 horsepower pulling on a 5/8-inch cable free the PIONEER?"

Mr. Lande: I object to that, Your Honor, as not containing the element as to the manner in which

the pulling of the NORTH QUEEN was done. On a straight pull the evidence is that the line parted but on a swerving back and forth the evidence is that she worked her off.

Q. By Mr. Verleger: In the last question you may assume: If the PIONEER was hard aground and had not in whole or in part been freed by the tide, and was in a position with her bow from three to five feet out of water, could a vessel the size and capabilities of the NORTH QUEEN, with an engine of 300 horse-power pulling on a 5/8-inch steel wire (162) by swerving back and forth pull the PIONEER off? A. No.

Q. Why do you say that? A. You assume that the bow is four to five feet out of water and it is never hard and fast aground. By pulling with a fishing boat and with a 300 horse-power engine, he hasn't sufficient horse-power to move that vessel when it is hard and fast.

Q. In your opinion, is it essential before such a pulling operation can be successful to have the boat partly freed by the rise in tide? A. It is.

Q. You may assume that the PIONEER went aground at approximately between 6:30 and 7:30 and the tide conditions were as previously stated; that her bow was approximately one foot to a foot and a half out of water when she stranded, and that she came off between 7:30 and 9:00 o'clock. What, in your opinion, was the principal factor in freeing her? A. Tide."

The conclusion expressed in this testimony is, indeed, inescapable. The only credible testimony was that the water line of the PIONEER was about a foot out of water—six inches higher than usual, when she went aground. A very small portion of the five foot rise in tide

anticipated would have floated the PIONEER and by the time of the second try, time enough had elapsed for this to occur.

There was a good deal of speculative testimony that as the tide rose the danger of damage to the PIONEER would increase. This testimony was based, however, on assumptions inconsistent with the facts. Mr. Berry assumed that the bow of the PIONEER was three to four feet out of water.

His testimony in this connection was as follows [A. 132]:

“A. The PIONEER was almost horizontal to the beach. I would say it was on a 15, 20 or possibly 25 degree diagonal to the beach, and it was possibly three-quarters of a mile off shore and lying on the rocks which was surrounded by kelp, with the bow, I would say, about three or four feet above water. We didn't come more than three or four hundred feet close to the vessel on account of the kelp and the rocks.”

He apparently meant by this that there was daylight below the bow, for he testified that a twelve or fifteen-foot tide was necessary to float the PIONEER [A. 142]. Neither Mr. Xitco or anybody else agreed with this assumption.

Captain Varnum likewise rested his testimony on an assumption which was equally in disaccord with the facts, for he assumed that the PIONEER had broken its propeller blades and would have to pull itself off with its anchors. He testified [A. 157]:

“Q. In other words, in your opinion there would be no assurance that even high tide would float her

off? A. A lot of things can happen from the time he went on before he would have any means of pulling himself off with his anchors. He had no more propeller, he had broken his blades, and in the meantime, she is pounding and might not be fit to take off when he got his anchors out."

That this assumption was completely erroneous was shown by the fact that the PIONEER made port under her own power. The suppositions based on assumptions so fallacious cannot be ascribed any weight.

To sum up, it would seem that the situation was one where, quite apart from the varied sources of outside assistance to the PIONEER, it appears highly probable that she could have released herself.

B. The Potential Ability of the Pioneer to Free Itself Was Material.

If there could be any doubt that the potential ability of the PIONEER to free herself was most material, that doubt we believe must be clearly resolved by the case of *Ulster S. S. Co. v. Cape Fear Towing & Transportation Co.*, 94 Fed. 214, which we have mentioned before. In this case the steamship TORR HEAD was grounded on Frying Pan Shoals off the South Carolina coast. Her value was \$300,000. An attempt was made to back her off which did not succeed. The steam tug BRANDOW was then engaged and commenced to pull against the TORR HEAD; this was at about 9:30 a. m. the day of the stranding. At 12:30 p. m. the tug BLANCHE, with a salvage crew, arrived. At 3:30 p. m. a small steam tender called the ISABEL also arrived, all tugs pulling

against the TORR HEAD. This continued until 5 p. m. without result. The captain of the ship then ordered the tugs to stop towing and run the steamship's starboard anchor out. With the aid of the anchor, the vessel was turned about. The tugs left about 7:30 p. m. over the protest of the master and returned later. In the meantime, the ship had jettisoned cargo until about 10 p. m. About 11 p. m. one of the tugs ran out the anchor straight ahead. At about 1 a. m. on the morning of the 25th, all tugs pulled together with the ship working her engines and straining on the chain. In much this manner work continued until about 4:25 a. m., at which time the vessel was afloat. The trial court gave an award of \$13,000 which, on appeal, was cut to \$6,500 by the Fifth Circuit Court of Appeals, the Court relying heavily on *The Hesper*, *supra*, and stating at p. 220:

“ . . . In addition to this, we think it apparent from the record that the allowance of salvage was made largely on the theory that the libelants' tugs and their crews really performed the whole services of saving the TORR HEAD from impending peril, while the fact is, as clearly appears from the evidence, and hereinbefore referred to, the real services which put the TORR HEAD afloat were rendered by the master and crew of the TORR HEAD, using her machinery and appliances; and it seems probable,—extremely probable,—the good weather continuing, that without the services of the libelants' tugs the energetic master of the TORR HEAD would have successfully floated his vessel through the use of his own crew and appliances.”

In that case it will be observed that the danger was much like that existing in this case, the value of the vessel salvaged was three times as large, and the services rendered were over a very much more substantial period of time. As will appear hereafter, the same mistake appears to have been made in dealing with our case as was made by the District Court in the TORR HEAD case. It is hard to see how, in the face of the reduction by the Circuit Court in the TORR HEAD case, the present award can stand, and, in fact, it is hard to see how appellee could receive anything like as much as was awarded in that case.

In *The Wahkeena* (C. C. A. 9th), 56 F. (2d) 836, at 838, the Court likewise indicates that this factor is regarded as important in this Circuit, for it there stated:

“(2) Similarly, the appellant cites some testimony tending to show that the WAHKEENA could have kept afloat, drifted clear of the jetty, and saved herself. There is, however, considerable evidence that the stricken schooner’s chances of saving herself, in her crippled condition, were extremely slim. It must be remembered that both of the WAHKEENA’s boilers were cut out, and that the vessel was without steam. Furthermore, her radio went out of commission, and she had no signaling device other than her bell and rockets.

“On the whole, we are inclined to agree with the lower court that both the WAHKEENA and her rescuer encountered some danger. We likewise concur

with the view that 'The Court can only speculate as to whether the "WAHKEENA" would have come off the jetty with the turn of the tide, and, if so, whether she would have been picked up by some other boat before again stranding.'

"We do differ, however, with the learned judge below as to the degree of the danger and as to the value of the CUDAHY'S services in towing the stricken schooner back to port."

It will be observed that in that case the argument that the salved vessel would have come free with the tide was found to be merely speculative. We should assume, however, from the treatment given the argument in that case, that if there had been tangible evidence, to a practical certainty, as in the present case, of such ability, and if the WAHKEENA had been capable of making port under her own power, as the PIONEER was, the factor would have been treated as of considerable significance.

The WAHKEENA is further of the utmost importance, in that it does specifically hold that the error of the trial court in appreciating the degree of danger of the WAHKEENA was ground for a reduction in the award.

Likewise, in the *Edith L. Allen* (C. C. A. 2d), 129 Fed. 209, the Second Circuit Court of Appeals had before it a similar problem. In that case the District Court had mistaken the degree of danger to the salved vessel because it has misunderstood the effect of a change in wind on the danger of a stranded vessel. On the basis of that misunderstanding as to danger, it reduced the award.

From these authorities we would take it to be unquestionable that if the trial court failed to consider as a material factor the high probability that the Pioneer could free herself, that in itself would require a substantial reduction in the award.

C. The Ability of the Pioneer to Free Herself Was Not Recognized as a Factor in Determining the Award.

The court's oral opinion makes it quite clear that it did not enter into a consideration of whether or not the PIONEER might free herself, treating this as a mere matter of speculation, and treating as the only significant item the fact that the NORTH QUEEN had actually pulled the PIONEER off. At A. 50 the court stated:

“ . . . Here we had, according to the undisputed evidence, a calm or a relatively calm sea. The operation occurred during a month when weather is somewhat uncertain. I am saying that because I think the court has the (69) right to consider the history of the times, and to use its own knowledge of such matters, so that there could not be any definiteness with reasonable certainty as to what would ensue toward the latter hours of the night in question. The same condition of weather might have continued. On the other hand, there might have been some disturbances either by wind or wave that would have aggravated the situation. There was great peril there, not only because of the position of the “Pioneer”, but because of the kelp that, according to the undisputed evidence, was present in large area, which was a serious inter-

ference with maneuvering ships of the size of the two ships in question. So that we have the peril of a ship that was in extremis. She was on the rocks. Whether she was fast or whether she was extricable is a pure matter of conjecture. The fact is she was extricated by the efforts of the libelant."

This failure to consider the ability of the stranded vessel to free herself is the exact factor that led to the reduction of the award in the *TORR HEAD*.

The findings, as they do consistently through this case, confirm the view given by the oral opinion, for there is nothing in the findings which would indicate that there was any awareness of the probability that the *PIONEER* could free herself. On the contrary, the description of the position of the *PIONEER* is merely the following [A. 57]:

" . . . that said vessel thereupon immediately sent out a distress call for help over her radio; that the said vessel was then and there in peril in extremis, stranded on the rocks and surrounded by kelp; *that her own means could not remove her from the strand; that immediate aid was required.*" (Italics added.)

This finding expresses a conclusion which is right in the teeth of the physical facts. It makes explicit what was merely implicit in the oral opinion, that is, that the award is based in part or mistake as to the danger of the *PIONEER*. Such error is plain ground for modification of the award.

Ulster S. S. Co. v. Cape Fear etc. Co., supra;
The Edith L. Allen, supra.

V.

**The Court Erred in Failing to Consider the Lack of
Expense to the Salvor.**

Assignments of Error applicable:

“XVIII. That the court erred in that it did not find or consider in determining the amount of the salvage award that the services of the North Queen were performed without cost or expense, loss or damage, or substantial risk to the North Queen, its owners, master or crew.”

**A. The Labor and Expense of the Salvor Is a Material
Factor.**

We do not proposed to collect cases in support of this proposition, because we do not believe it necessary. *The Tordenskjold* (C. C. A. 5th), 255 Fed. 672, is one of the many cases in which this factor is treated as significant in reducing an award. We question, in fact, whether there is a single reported salvage case in which this factor is not mentioned, where there is any attempt at an exposition of factors considered.

**B. Lack of Expense to the Salvor Was Not Considered; on
the Contrary, It Was Assumed That the Salvor Suffered
a Loss of Fish.**

In the present case, the labor and expense are insubstantial. An hour and a half to two hours was involved. This is mentioned by the Court in its oral opinion [A. 52]. That the insubstantiality of the expense involved was not considered appears from the findings, for this factor is no-

where mentioned in them. The court's oral opinion confirms this inference. The opinion shows that, in originally fixing the award, rather than considering the case as one in which there was no evidence of expense to the salvor, the court assumed that there was a loss of fish to the salvor.

At page A. 54 the court stated:

“ . . . I am not making the award either upon the possibility of there being a catch of the entire 190-ton capacity of the ship, nor upon the percentage of the value of either or both ships. *I am not leaving those elements out of consideration*, but I am not making the award essentially upon either of them.” (Italics ours.)

There was no evidence in this case that other vessels caught fish on the night in question, and there was no evidence of a catch on preceding or subsequent nights by the NORTH QUEEN. Courts will not assume a loss of earnings to vessels engaged in the “speculative business of sardine fishing” in the absence of such evidence.

John Grevstad v. Oil Screw St. Mary (N. D. Cal.), 1936 A. M. C. 755;

Atchison, T. & S. F. Ry. Co. v. California Sea Products Co. (C. C. A. 9th), 51 F. (2d) 466, at 468.

The latter case involved whale fishing rather than sardine fishing, but the principles applicable are in no way distinguishable.

VI.

The Court Placed Overweening Emphasis on the Skill of Appellee.

Assignments of Error applicable.

“IX. That the court erred in finding, and in considering in making the award, that the salvage services performed by the North Queen, her crew and master, were of a very high order of merit.

X. That the court erred in that it did not find and did not consider in making the award that the services rendered by the North Queen, her crew and master, did not call for or involve exceptional skill or heroism.

XI. That the court erred in that it did not find or consider in determining the award, that the assistance rendered by the North Queen was rendered without substantial peril to, expense to, or sacrifice by the North Queen, her master or crew.

XVIII. That the court erred in that it did not find or consider in determining the amount of the salvage award that the services of the North Queen were performed without cost or expense, loss or damage, or substantial risk to the North Queen, its owners, master or crew.”

A. Skill Appears to Have Been the Principal Factor Upon Which the Award Was Based. The Services Here, Although Skilfully Performed, Involved Nothing Extraordinary or Unusual.

We have heretofore referred to the fact that the skill with which appellee assisted the PIONEER seems to have been virtually the sole factor considered in making the award. The only factors referred to in the findings are danger to the PIONEER and skill of the NORTH QUEEN.

The eighth finding seems to show the confusion between the merit of the salvage, which is the resultant of many factors, and the skill of the salvor, which is only one of the factors involved. It is as follows [A. 59]:

“That it is true that the salvage services rendered by the ‘North Queen’ and her crew and master were highly skillful and of a very high order of merit; that their manner of working the vessel off the rocks showed real seamanship in an emergency and exceptional skill based on experience of a high type; that the efforts of the ‘North Queen’ and crew were the prime and major factor which resulted in the freeing and extricating of the ‘Pioneer’ from the rocks.”

The finding in this respect appears to reflect a parallel confusion in the oral opinion in the District Court, for, in summing up the merit of the services, the court made the following statement [A. 54-55]:

“. . . It was the maneuvering of the vessel in a way to give leverage so that the greatest amount of beneficial force could be used on the disabled vessel, and at the same time taking proper precautions to not submit the salvor to an unusual risk. It is those two features which I think bring the case up into the dignity of a high degree of skill.”

We do not attempt to controvert the proposition that the service was skillfully rendered. But there was certainly nothing extraordinary or unusual about it. Moreover, in view of the fact that there was another vessel standing by to add its force to that of the NORTH QUEEN, should the NORTH QUEEN fail, we do not think that it can be said that extraordinary or unusual skill was called for. And, in view of the inability of a $\frac{5}{8}$ -inch wire to take the strain necessary to pull the PIONEER off, we think that it must be

assumed what actually happened was that the *PIONEER floated* off, with the assistance of the drag exerted by the *NORTH QUEEN*. There are countless cases in which the courts have spoken of like services as involving no extraordinary skill, and many of those we have quoted already for other purposes. We will, therefore, cite no further authority in this behalf here.

The service was skillfully and promptly rendered. Skill alone, however, in the absence of danger or hardship to the salvor, and in the absence of substantial labor or expenditure, does not justify treating salvage as of a very high order.

The Naiwa (C. C. A. 4th), 1924 A. M. C. 1432;
The Professor Koch, 260 Fed. 969.

In the former case the court stated at page 1434:

“The claim asserted is undoubtedly for a salvage service, but whether the same may be considered of a high order of merit as that term is generally understood, is questionable. So far as promptness in the discharge of the undertaking and intelligent execution thereof is concerned, no improvement could doubtless well have been made, since the libellant is an expert in its business, and of large and varied experience; but otherwise what was done did not embrace elements which enter particularly into the increase of the merit of the service, that is to say neither existing weather, sea or other conditions prevailed that so frequently make an undertaking of this sort hazardous in the extreme.”

In the latter case, the court stated at page 972:

“. . . The most meritorious feature of the libellant's services, as I view them, is the good judgment and skill in handling and navigating the tugs and the

wreck which was displayed by Capt. Nickerson (the libelant's manager) and his assistants. Their work seems to have been done exactly right from start to finish. But the libelants are not entitled to any such enormous toll out of the barque and her cargo as their libel claims. They are entitled to the market value of their services, plus a fair reward for the risk, which was little, for the promptness, which was excellent, but not exclusive, for the skill displayed, and for the success which resulted. The predominant consideration, as it seems to me, in awards for salvage service, where the property has not been abandoned, is that they should be sufficient to obtain again, if circumstances should repeat, the same, or adequate, service. The Samuel B. Hubbard (D. C.) 229 Fed. 843.

“Applying these principles, I think that \$10,000, which is more than four times the commercial value of the libelant's work, and many times that of its work in getting the barque from the rock where she stranded into Scituate harbor, is adequate, and is in harmony with awards in similar cases.”

It is worthy of note that in the latter case, which involved freeing a stranded barque worth \$117,000, with a cargo of \$713,000, the award was \$10,000. The tugs involved were of a value of \$150,000 and spent a time of around 200 hours on the job. In that case, as in this case, other assistance (in the form of a revenue cutter) was available.

We need not draw the obvious comparison between that case and the present case.

It is submitted that the foregoing authorities establish that the court erred in treating the case as one involving service of a high order of merit, solely on the strength of skill ~~plus danger~~ *without danger*.

VII.

The District Court Erred in That It Granted an Award Which Departs From the Path of Authority and Is Palpably Excessive.

A. An Award Which Is Palpably Excessive, and Which Departs From the Path of Authority, Will Be Reduced.

We have already pointed out, in opening this brief, that an award which "does not follow in the path of authority" will be reduced, "even though no principle has been violated or mistake made."

The Bay of Naples (C. C. A. 2d), 48 Fed. 737;
Canadian Government Merchant Marine Ltd. v. United States (C. C. A. 2d), 7 F. (2d) 69, 1925 A. M. C. 765.

Similarly, it has been sometimes said that an award will be modified if "clearly . . . inappropriate."

Simpson v. Dollar (C. C. A. 9th), 109 Fed. 814.

Similarly, in *Huasteca Petroleum Co. v. 27,907 Bags of Coffee* (C. C. A. 2d), 60 F. (2d) 907, 909, an award was reduced, the court (per Augustus Hand, J.), stating that the award allowed was "far more than has been customary in similar cases."

B. This Award Far Exceeds Those Which Have Been Customary for Like Services.

We have already cited and discussed at some length in connection with various arguments number of cases involving services rendered to stranded vessels in calm weather, in which cases the Circuit Courts intervened to alter the award.

In *The Hesper* (18 Fed. 692, mod. 18 Fed. 696, aff'd 122 U. S. 256, 7 S. Ct. 1177), the value of the vessel assisted was \$106,000, and the award for assistance was reduced from \$8,000 to \$4,200. Similarly, in *The Lucia* (D. Ct., S. D. Fla.), 222 Fed. 1015, the District Court, for similar services to a vessel worth \$300,000, awarded \$4,000. In *Ulster S. S. Co. v. Cape Fear Towing & Trans. Co.* (C. C. A. 5th), 94 Fed. 214, an award of \$13,000, nearly the same amount as that awarded in this case, was cut to \$6,500. The vessel involved was worth about \$300,000. In *De Aldamiz v. Th. Skogland & Sons* (C. C. A. 5th), 17 F. (2d) 873, the award for freeing a stranded vessel, worth \$60,000, was \$5,000, an increase of the District Court award. In *Simpson v. Dollar* (C. C. A. 9th), 109 Fed. 814, an award of \$1,000, though recognized to be on the low side, was approved by this Circuit Court for similar services in assisting a vessel worth about \$40,000.

The cases heretofore referred to, in which awards for fair weather assistance to stranded vessels were allowed in the neighborhood of the award in this case, are cases where the values are greatly in excess of those presented here.

The Tordenskjold (C. C. A. 5th), 255 Fed. 672
(reduction of award from \$40,000 to \$10,000;
value of stranded vessel about \$1,000,000);

*Societa Commerciale Italiana Di Navigazione v.
Maru Nav. Co.* (C. C. A. 4th), 280 Fed. 334
(valued at \$370,000; 39 hours' labor; a reduction of award from \$35,000 to \$20,000).

It will be observed that the foregoing cases, with the exception of *The Lucia* and *Simpson v. Dollar*, are not merely cases in which a different award was granted, but

The

Assignments of Error Applicable.

XX. That the court erred in finding that the salvage services of the NORTH QUEEN, her master and crew, to the PIONEER, were and are of the value of \$12,000.00.

XXI. That the court erred in adjudging, ordering and decreeing [88] that libelant recover from the respondent vessel PIONEER the sum of \$12,000.00.

In *The Hesper* (18 Fed. 692, mod. 18 Fed. 696, aff'd 122 U. S. 256, 7 S. Ct. 1177), the value of the vessel assisted was \$106,000, and the award for assistance was reduced from \$8,000 to \$4,200. Similarly, in *The Lucia* (D. Ct., S. D. Fla.), 222 Fed. 1015, the District Court, for similar services to a vessel worth \$300,000, awarded \$4,000. In *Ulster S. S. Co. v. Cape Fear Towing & Trans. Co.* (C. C. A. 5th), 94 Fed. 214, an award of \$13,000, nearly the same amount as that awarded in this case, was cut to \$6,500. The vessel involved was worth about \$300,000. In *De Aldamiz v. Th. Skogland & Sons* (C. C. A. 5th), 17 F. (2d) 873, the award for freeing a stranded vessel, worth \$60,000, was \$5,000, an increase of the District Court award. In *Simpson v. Dollar* (C. C. A. 9th), 109 Fed. 814, an award of \$1,000, though recognized to be on the low side, was approved by this Circuit Court for similar services in assisting a vessel worth about \$40,000.

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(valued at \$370,000; 39 hours' labor; a reduction of award from \$35,000 to \$20,000).

It will be observed that the foregoing cases, with the exception of *The Lucia* and *Simpson v. Dollar*, are not merely cases in which a different award was granted, but

are cases in which the appellate court intervened to set a proper figure. They are closely analagous to the present case, except that the services rendered generally required a great deal more time than those involved in the present case; and in most of them the salved vessel was not in nearly so good a position as the PIONEER, in terms of its ability to free herself and in terms of the availability of other assistance. It would seem that in these cases higher awards were justified than in the present case, but if these cases, without any such allowance, be applied unaqualifiedly to the present situation, the most that would seem to be justified would be an allowance to appellee in the neighborhood of \$4,500.

In order, however, properly to appraise the present situation, we think that other cases, where the service rendered was as short as that in this case, also should be taken into consideration so that the awards referred to above may be properly discounted.

The first case which should probably be considered in this connection is that of *Richfield Oil Co. v. Curry et al. (The Kekoskee)* (C. C. A. 9th), 55 F. (2d) 875, 1932 A. M. C. 287.

In this case the tanker of that name, valued at around \$500,000, was discharging fuel oil at a Seattle dock. The oil, gasoline and debris under the dock caught fire. The KEKOSKEE was discharging fuel oil at the time the fire was discovered, and the whole forward part of the ship caught fire shortly after the commencement of the blaze. The tug GEORGIA, valued at \$60,000, maneuvered under the stern of the KEKOSKEE, made a line fast to it after practically all the crew of the KEKOSKEE had left, and pulled the ship away from the dock. Their services were prompt, skillful and efficient, and there was an exposure

to great danger, either real or apparent, because of the likelihood of explosion on board the KEKOSKEE. It was believed by the crew of the GEORGIA that the KEKOSKEE was discharging gasoline rather than oil at the time the fire occurred, which certainly does not reduce the credit for their services. An award of \$11,000 was granted.

In that case, it will be observed that the period of service was close to that in the present case; the value salvaged was close to five times as great; there was great danger to property as opposed to little danger to property in the present case, and great danger to life as opposed to no danger to life in the present case.

Even were the dangers equivalent, in view of the great difference in values, a much lower award in the present case would appear to be required. In view of the fact that there was also a great difference in danger, it would seem that appellee would be liberally rewarded if he received twenty-five per cent of the amount granted in that case. From the other cases involving services over similar short periods of time, it would seem questionable as to whether even that much should be given.

A somewhat similar case involving a stranding is *The St. Charles* (E. D. Va.), 254 Fed. 509, in which the vessel ST. CHARLES, valued at \$500,000, pulled the MONT CENIS, valued at \$2,000,000, off the strand in a space of about three hours. No special circumstances of danger were involved so that the comparison is closer to the present case than to the KEKOSKEE. \$15,000 was awarded and this, it will be noted, where the value salvaged is more than fifteen times as great as that in the present case.

The rapid decline in the amount of such awards for so short a period of service, in the absence of evidence of danger, is illustrated by the case of *The Agwisun* (C. C. A. 2d), 1931 A. M. C. 957, 49 F. (2d) 263. In that case there were circumstances of danger, apparently, however, not as great as in *THE KEKOSKEE*, previously cited. In this case a \$70,000 tug came to the assistance of a tanker on fire, playing water on flames wherever seen and on heated plates. The tanker was valued at \$341,395. An award of \$1,000 by the District Court was increased to \$3,000 by the Circuit Court of Appeals.

In *The Egbert H* (C. C. A. 5th), 131 F. (2d) 111, a vessel of that name, valued at \$25,000, was caught with her engines dead beneath a bridge in the Savannah River. She was in imminent danger of sinking as the tide was rising, and she had a freeboard of only ten inches. If she had sunk the damages would probably have run from \$12,000 to \$15,000. The tug *CYNTHIA* No. 2, valued at \$125,000, came to her rescue and towed her to safety, without risk to herself. An award of \$3,000 in the District Court was reduced to \$1,000 by the Circuit Court of Appeals.

It is believed that these authorities suffice to show that where services are rendered over so very short a period of time, the award is less than it would otherwise be. The foregoing and following cases also show, it is submitted, that the award in the present case far exceeds those which have been customary.

In

Rustad v. Wuori (The Melody) (C. C. A. 9th),
1946 A. M. C. 1637, 157 F. (2d) 448,

\$4,300 was awarded out of a salved value of \$19,500 for the towing of a derelict. There were circumstances of hardship and difficulty in an extreme degree, and something approaching heroism, as well as proof of loss of fish in the amount of \$3,000 to \$5,000 to the salvor.

In

The Bretanier (C. C. A. 4th), 267 Fed. 178,

assistance was rendered to a stranded vessel, valued at \$500,000, over a period of at least five days by a salvor, valued at \$175,000, consisting of obtaining and laying wrecking anchors by which the vessel in distress was freed. \$12,000 was awarded.

In

United States v. Central Wharf Towboat Co. (C. C. A. 1st), 3 F. (2d) 250,

a steamer valued at \$70,000 was stranded and pounding in heavy weather in a storm, the violence of which was increasing. Two tugs, together with the revenue cutter OSSIPEE, freed her and towed her to port. The tow was an extraordinarily difficult and dangerous one. The period of the assistance does not clearly appear. \$9,000 was awarded to tugs whose value totaled about \$75,000.

In

The City of Portland (C. C. A. 5th), 298 Fed. 27, three tugs were towing a motor schooner valued at \$300,000. The propeller shaft dropped out and they beached her and pumped her out. This was held to be a salvage service and, while the district Court awarded \$15,000, this award was reduced to \$6,000 by the Circuit Court of Appeals. Seventy hours' service was provided in all by the three tugs.

In

Holmes v. City of New York (C. C. A. 2d), 30 F. (2d) 366,

a tug removed a dumper barge valued at \$42,000 from a pier at which there was a fire. The fire was not particularly serious and the service was rendered in a fairly brief period of time. \$2,000 was awarded by the District Court, which was reduced to \$1,000 by the Circuit Court of Appeals.

In

The Professor Koch (D. Mass.), 260 Fed. 969,

\$10,000 was awarded for pulling a stranded barque, valued at over \$800,000, off a rock in fair weather. The value of the tugs employed was about \$150,000, and the various tugs employed were occupied for a little over 200 hours.

In

The High Cliff (C. C. A. 2d), 271 Fed. 202,
\$5,000 had been awarded by the District Court for services rendered by a tug in taking a barge, which was adrift with a cargo worth \$200,000, into still water. The award was reduced by the Circuit Court of Appeals to \$2,500.

In

The Santa Barbara (C. C. A. 4th), 299 Fed. 152,
a vessel valued at from \$300,000 to \$350,000 was taken from alongside a pier on which there was a very serious nitrate fire. About an hour and a half was occupied, and there was substantial danger. \$8,500 was awarded.

In

The Peru (E. D. Pa.), 99 Fed. 783,
a tug valued at \$3,500 pulled a sailing ship, valued at \$60,000, away from a pier fire. \$2,500 was awarded, there being no special danger to the tug.

In

The Niagara (S. D. N. Y.), 89 Fed. 1000,
a ship of that name stranded in the harbor of Santiago de Cuba. Her value was \$125,000. The MAMALUKE, a steamer of 2,600 gross tons, about the same size as the NIAGARA pulled the NIAGARA off the strand. The MAMALUKE was the only vessel available capable of doing the job, and had great difficulty, because of her size, in maneuvering in the narrow channel required. \$7,100.84 was allowed. The services extended over three days, and there

was a claim of \$3,200 for wear and tear to machinery, and for fuel for which nothing over the award was allowed.

In

The Labrador (E. D. N. Y.), 39 Fed. 503, the subject-vessel, valued at \$200,000, having a cargo on board worth \$750,000, caught fire. The McCALDIN, together with the RESCUE, beached the LABRADOR and put out the fire. \$4,500 was awarded to the McCALDIN. It was shown that the actual danger of total loss of the cargo was not great.

It would be possible to continue in this same manner more or less interminably. It seems to us, however, that the foregoing cases are quite sufficient to establish that the award in the present case exceeds the customary standard by a wide measure, and is palpably excessive. Where comparable awards had been made by district courts for services comparable, or, for that matter, substantially exceeding those in this case, to vessels of like valuation, they have been quite consistently reduced by the circuit courts. This case has none of the circumstances held to authorize a high award. There is neither substantial danger to the salvor or to their ship, nor hardship, and certainly there is nothing that could be called heroism. Other assistance was available; the PIONEER herself was not in immediate danger and was not helpless. We do not see how it could be seriously contended that the NORTH QUEEN was entitled to more than a very moderate award.

Conclusion.

Appellee has received an award of \$12,000 for an hour and a half to two hours' service rendered in calm weather, without special circumstances of hardship or danger. It appears probable that the PIONEER could have freed herself on the rise of tide, and certainly there was assistance other than the NORTH QUEEN available. There is no evidence of expense to the NORTH QUEEN. It is respectfully submitted:

First: That under these circumstances a \$12,000 award on somewhat less than a \$113,000 valuation is grossly excessive.

Second: That this award was the consequence of legal error in that the Court failed to consider the availability of other assistance, was mistaken in assuming that the PIONEER could not free herself, and failed to consider the lack of danger and the absence of expense to the NORTH QUEEN.

It is respectfully submitted that the award should be very substantially reduced. In view of the authorities cited above, it should not exceed at most about one-fourth of the amount actually granted, and an even greater reduction would be amply justified.

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Proctors for Appellants.

No. 11879

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MARION JONCICH, JOE C. MARDESICH and ANTOINETTE
BOGDANOVICH,

Appellants,

vs.

ANDREW XITCO, JR.,

Appellee.

APPELLEE'S BRIEF.

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FILED
JUL 17 1948

PAUL P. O'BRIEN,

CLERK

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Appellee.

APPELLEE'S BRIEF.

Counter-Statement of Facts.

On the night of January 9, 1947, the Pioneer hit a rock ledge known as Two-Rock Point, off Laguna Beach, California, while going at 8 knots. She went on the rocks the full length of her keel, was broadside to ground swells, and rocked with them. The North Queen came up within 20 minutes of the distress call of the Pioneer. The North Queen found over half of the bow out of the water, and the water line at the bow was above the water a distance estimated at from three to five feet [A. 80-85]. The North Quen came up to the rocks and kelp and took a 5/8" wire cable from the Pioneer, turned around and proceeded to pull.

The first pull by the North Queen was a "direct pull" [A. 101, 135], caused by the North Queen pulling straight ahead in the direction the master thought the Pioneer went on the rocks. The $\frac{5}{8}$ " cable snapped at once, but before it broke, it put an "awful strain" on the rigging [A. 102].

The North Queen then called for more wire cable from the Pioneer. The reason for the additional cable was that the master of the North Queen thought that the greater length would extend from one vessel to the other in a large semi-circle, or "scoop" as he called it, and thus would have a lot of spring to it and less liable to break when a strain was put on it [A. 104].

Then Matt Berry, a crew member of the North Queen who had extensive salvage experience with the U. S. Navy in the South Pacific during the last war, and the master, Xitco, changed the tactics of the North Queen. Instead of pulling in a straight and direct manner, the North Queen was swung from side to side, exerting a pull from side to side, as well as backwards, on the Pioneer.

Xitco, the master of the North Queen, described the maneuver as follows [A. 104, 105]:

" . . . we turned 10 to 15 degrees to starboard and then to port, keeping the boat going this way and then that way, the same as a crow-bar, so that we could wheel her out. We started pulling that way for 15 or 20 minutes and she finally come off. . . . we were pulling on an angle and swinging it."

The vessel swung back and forth between positions A and B on libelant's diagram [Exhibit 2] [A. 106]. She was always moving, never in a stationary position.

As testified by Matt Berry [A. 137]:

“ . . . I went up on the bridge with the master of the vessel, and we decided that inasmuch as we couldn't pull the vessel off with a direct pull of the $\frac{5}{8}$ -inch wire, we would attempt to pull her off by using a series of diagonal tows, and we started first to the right, and we got to a certain position of leverage, we would give it a full throttle, and then swing again to port and again give it the full throttle. We worked on the theory of a lift or bar, of squirming the vessel off the rocks. And after towing that way 10 or 15 minutes, I noticed it seems to slack the wire, which is a sign that the vessel had moved; and since the wire had slacked, I knew she had moved and I told the master I believed the vessel had moved. Then we started again on the next angle and the vessel seemed to give a lurch and came straight off.”

Subsequent inspection of the hull when Pioneer was drydocked disclosed extensive damage to the vessel's bottom [A. 18], and that the screens on the sea suction, six feet above the keel, were smashed [A. 213-216], and the propeller blades were bent.

I.

The Record Will Not Substantiate the Claim of Appellants That There Was Effective Aid Available to the Pioneer, Other Than the North Queen; and the Court Committed No Error in This Regard.

A. There Is No Evidence in the Record as to Availability of a Tug From San Pedro, and None That the Sunlight Could Have Effectively Aided the Pioneer.

Appellants make much of the fact that another vessel, the Sunlight, came up to the scene of the wreck. The Sunlight arrived after the North Queen had commenced salvage work [A. 26, 37, 125, 150].

The Sunlight was another purse seiner such as the North Queen and Pioneer. She had a $\frac{5}{8}$ " wire cable on board.

But it does not appear that the master of the Sunlight, or anyone else on board, had the know-how or ability for salvage that Xitco and Berry of the North Queen possessed [A. 138]. If the Sunlight had merely put its $\frac{5}{8}$ " cable on board the Pioneer, and pulled on it, which is the way one would ordinarily adopt, the straight pull on the small cable would have broken it [A. 101, 103, 135]. There is no evidence that the Sunlight would have asked for 75 fathoms or more of cable [A. 103, 104, 137], so as to give the cable a cant as it stretched between the vessels and thus act as a spring, or that the Sunlight would have used a maneuver of pulling from one side to the other of the stranded vessel and working it loose while at the same time exerting a pull [A. 104, 105, 106, 137, 138].

The amount of effective help that the Sunlight could have given the Pioneer is a matter of pure surmise and

conjecture, and for that reason cannot be an important factor in this case.

The subject of help from San Pedro for the Pioneer is a matter that was not gone into at trial. No testimony was given bearing on this subject. The Court may take judicial notice of the fact that San Pedro was about 30 miles from Laguna, but the Court may not take judicial notice as to whether or not, on the night in question, tugboats were in fact available for salvage service, the length of time it would have taken to contact the agents or masters of such a tug, the length of time it would take to assemble a crew at night, the length of time it would take the tug to finally get to Laguna. The Pioneer was in extreme danger during the five to six hours after her stranding [A. 108 to 113, inclusive]. She needed immediate aid to save her. She could not afford to wait until the next day for a tug [A. 153-158, 161].

B. Availability of Other Assistance Is Just One of the Factors to Be Considered in Making a Salvage Award.

The availability of other assistance was not stated to be one of the "main ingredients in determining the amount of the award" in *The Blackwall*, 10 Wall. 1, 19 L. Ed. 870, 77 U. S. 14.

Appellants did not prove that during the crucial hours any other vessel was available *that was manned by seamen so skillful that they could use a fishing vessel and a 5/8" wire cable to pull the Pioneer off the rocks*. The record is clear that ordinary seamanship could not do the job [A. 101, 102], and without use of great skill, a 5/8" cable could not stand the strain, nor was a purse seine fishing vessel powerful enough.

In *De Aldamiz v. Theo. Skogland & Sons*, 17 F. (2d) 873, cited by appellants:

“The evidence is far from being convincing that any of the other three ships in the vicinity of *Fronteree* *was capable of saving the ship in distress*, or was willing to take the risk of doing so.”

The next case cited by appellant, *Societa Commerciale Italiana Di Nor. v. Maru Nav. Co.*, 280 Fed. 334, the Court said (p. 337):

“Whilst we hold, as above stated, that the relations between the two vessels were not such as to deprive the *St. Charles* of the right to compensation, we are nevertheless of opinion that those relations imposed on each of them a degree of moral obligation to assist the other in case of need. Besides, it was to the obvious advantage of the *St. Charles* to render prompt aid when the accident happened. It was against orders for her to proceed without an armed convoy, and her officers were unfamiliar with the coast along which lay her course. This, then, is not the case of assistance which is at once voluntary and against self-interest, but distinctly the case of assistance which, although voluntary in a legal sense is at the same time of direct and important benefit to the one by whom it is rendered. *And this essential difference should be reflected in a materially less award than otherwise would be allowable.*” (Emphasis added.)

In the next case cited by appellants, *The John J. Howlitt*, 256 Fed. 971, there was “other and effective aid,” page 972, at hand; so effective that the *other* aid put the fire out, libelants standing by.

In *The Livietta*, 242 Fed. 195, cited next, a reading of the entire case will disclose that the element of other assistance was not a prime factor in inducing the Court to reduce the award. The opinion mentions that argument in a makeweight fashion, but the main discussion was on the elements of danger involved.

The Peru, 99 Fed. 783, was a case involving a vessel tied up at an oil loading dock. At the time of the fire, there were two tugs on the spot. The other tug was even a larger and better equipped tug than the salvor.

“The tow was unusually deliberate. There was little strain upon either the vessel or the crew. If it had not been for the fire, the labor performed would have merely supported a claim for towage, and this would have been fully compensated by the payment of \$50.00. But I cannot help being influenced by the value of the property saved, and by the imminence and seriousness to which she was exposed. The tug is not valuable and was in little danger, but she certainly saved the ship, either from destruction or from the loss of many thousands of dollars.”

The Court awarded the tug \$2,500.00. The value of the ship saved was \$60,000.00. It must be considered that the case arose in 1898. In the case at bar there are considerations of extraordinary skill which were not present in the case above cited.

The High Cliff, 271 Fed. 202, cited next by appellant, is not in point. It involved a barge adrift in New York Harbor, which was towed to safety by a tug. The Court said:

“It has long been settled in this circuit that salvage services *rendered in harbor cases, where tugs are abundant* and on the ground or nearby, are not serv-

ices of a high order. . . . The mere towing to safety a drifting barge or scow is usually regarded as salvage service of a low order of merit, and is compensated by a small award.”

Cuyamel Fruit Co. v. Bostrum, 19 F. (2d) 10, contains nothing that can be of assistance here.

The Roman Prince, 88 Fed. 336, involved a fire in the hold of a vessel tied up to a dock in New York. The salving tug saw the smoke and came up within 5 minutes and put a hose aboard. The city fire department’s fire engines came up within 5 to 10 minutes after the tug, and the fire engines did actually assist in the extinguishment of the fire, which facts distinguish the case from the one at bar.

The Marie, 39 Fed. 501, is likewise a case involving harbor tugs and their availability to the distressed vessel. The ability of the tugs to aid was not in question.

The Plymouth Rock, 9 Fed. 413, also involved a tug boat. Concerning the work done by it, the Court said:

“She was prosecuting in her own port the business for which she was in part designed and was in the ordinary pursuit of her employment, and she suffered no loss or injury in rendering the service; and neither the difficulty nor the personal labors or hazards of the salvors themselves greatly, if at all, exceeded those in cases of ordinary towage in rough weather; and other tugs were either near at hand or within a few hours call. *Many of the important circumstances, therefore, which often go to increase the amount of salvage compensation, are either wholly wanting in this case or exist only in a comparatively small degree.*”

The Santa Barbara, 299 Fed. 152, again involved harbor tugs at Baltimore. The only reference in the case to other assistance is in the following part of the opinion:

“In fixing the allowance made, the Court has not been unmindful of the fact that the service should be treated as a salvage of a low order of merit, by reason of its being a harbor service, with other assistance at hand. Nor has the fact that the city fire boats participated in the rescue been lost sight of.”

It is, therefore, submitted that a reading and analysis of the opinions in the cases cited by the appellants reveals that the cases do not support the appellants' claim that the availability of other assistance is a highly material factor in determining the amount of a salvage award. In some of the above cases, as noted, the availability of other assistance was involved, but in none of the cases was it considered a highly material factor. Instead, it is submitted, the Courts considered it as a subsidiary factor, not to be ignored, but not to be given great weight. Furthermore, in most of the cases where the availability of other aid was considered by the Court, the Court had before it a case of salvage in a harbor where tugboats were available, equipped for heavy tows and salvage, and whose business it was to do the type of work in question. Appellees submit that it is not a fair comparison to consider such cases as authorities for a rule that is to be applied in a case involving salvage on the high seas by a fishing vessel not equipped or rigged for towing or salvaging, by a vessel which voluntarily gives up its night's fishing operation to help a distressed vessel, in a situation where only by the use of exceptional skill and seamanship can a rescue be effected with the limited means at hand.

As this Court said in *The Wahkeena*, 56 F. (2d) 836, 838:

“The primary consideration in salvage cases is the amount of benefit conferred.” *The Nord Alexis* (C. C. A. 2), 273 Fed. 160, 162. “See, also, *Ehrman, et al. v. The Swiftsure*, (D. C.) 4 Fed. 463, 467, 468.”

C. No Substantial Evidence of the Availability of Other Effective and Timely Assistance Having Been Given, It Was Properly Not a Factor to Be Considered in Determining the Award.

As the record stands, the evidence is that the Sunlight came up to the scene of the wreck some time after the North Queen had commenced salvage work on the Pioneer and at about the same time that the final and successful maneuvers of the North Queen were made. The evidence is that the Sunlight was equipped with a $\frac{5}{8}$ " cable [A. 34] and that the North Queen was a larger vessel than the Sunlight [A. 28].

Now, the first movement of the North Queen was a pull on the Pioneer, in a direction the master of the North Queen thought the Pioneer went on the rocks. This would be the usual and ordinary method of attempting to pull her off. It is the method that we must presume the master of the Sunlight would have used, had he joined in the efforts. But under this method of a direct pull, the small $\frac{5}{8}$ " cable promptly snapped. Even with two lines aboard, there is no evidence whether or not the cables would have held or parted. There was no evidence of the condition

of the Sunlight's cable. It was used only for pursuing the net, so what it would have done under a heavy pull is not known.

It seems evident from the Trial Court's opinion that he considered the first attempt of the North Queen to be usual and ordinary seamanship. The Trial Court stated [A. 51]:

"The first movement was unsuccessful, and in my judgment, it is there (and then) that the high degree of skill has been established."

The combination of a vessel, a $\frac{5}{8}$ " cable, and a master and crew with ordinary seamanship, was not enough to save the Pioneer. It required one more element, one thing in addition, to take the North Queen and her cable and transform them into an effective salvor for the Pioneer. That plus factor was, in the words of the Trial Court:

" . . . the experiences of the man who directed the operations for the second effort to extricate the Pioneer were of a very high order in my judgment. They showed exceptional skill, according to the evidence, based upon experience of a high type of value in a situation such as that which confronted the Pioneer at the time. I think the maneuver in utilizing the principle of the lever showed real seamanship *in extremis*. If the pull had been straight, as it probably was primarily, there is a good deal of doubt under the evidence as to whether the operation would have been successful. So that there was this high degree of skill manifested after the line parted, which, in my judgment, shows an exceptional skill in this operation."

The experience of the man who directed the operations for the second effort (Matt Berry) appears in the record from pages 130 to 132, and 137 and 138, of the Apostles in Appeal.

There is not a scintilla of evidence that anyone on the Sunlight had this type of experience or knowledge. For all that appears in the record, the Sunlight lacked a master or crew possessing such extraordinary and exceptional skill in seamanship that could effectively and successfully save the Pioneer.

Therefore, the Trial Court was justified in attaching little weight, if any, to the presence of the Sunlight in determining the award to the North Queen.

D. Supposing That the Sunlight Had Helped the North Queen in Salving the Pioneer, Would That Have Decreased the Amount of the Award?

Appellee questions the very basis for appellants' assumption that the availability of other help, the vessel Sunlight, would be cause to reduce an award to the North Queen.

Suppose the Sunlight had helped the North Queen in salving the Pioneer, and that a libel for salvage had been filed by the two vessels against the Pioneer. Would not the fact that two vessels were employed *increase* the award, because of their greater combined value and greater risk the two took and time they both lost?

Certainly if two vessels were employed, there would be no reason to decrease the award.

II.

**The Trial Court Properly Estimated and Considered
the Danger to the North Queen.**

**A. The Trial Court Properly Estimated and Considered
the Danger to Salvor as a Factor in the Award.**

The evidence shows that the Pioneer was stranded upon submerged rocks. Off Laguna Beach there is a rock ledge point that is submerged [A. 85]. The evidence also was that around this submerged rock ledge there was an extensive bed of kelp [A. 81]. The night was dark, the moon was not up as yet.

As the North Queen came up to the Pioneer, she had to be careful that she did not run up the same rocks that stranded the Pioneer [A. 91].

Also, the pull on the Pioneer had to be made with the bow of the North Queen pointed seaward. This would ordinarily mean that the stern of the North Queen would be facing the Pioneer, and to get in that position, the North Queen would have to back up to the Pioneer. But if the master of the North Queen did that, he ran too great a chance of hitting his propeller against the rocks and disabling his vessel, too. So he came in bow first, and took the line from the Pioneer, backed out to safety, turned his vessel and took the line from the bow to the stern [A. 91, 92]. The Sunlight also apprehended danger, for the master of that vessel stated that he came as close to the Pioneer as he "dared" [A. 27].

The Trial Court properly evaluated the above circumstances, for in his opinion, he said [A. 50-51]:

"We must bear in mind that the libellant vessel was not equipped for salvage purposes. She was a fish-

ing boat, and that factor should not be lost sight of in evaluating the type of service which she rendered to the disabled ship. She responded to the call, and in doing so, while probably not placing herself in a great peril on account of the distance separating the two vessels at the time of the first movement, *there was a good deal of danger to be apprehended in going close to the obstacles in the pathway, which had caused the Pioneer to become fixed on the rocks.*" (Emphasis added.)

The above portion of the Court's opinion certainly shows an appreciation of the degree of danger to the North Queen and the decree is certainly entitled to the presumption that the same was considered in fixing the amount of the award.

B. The Record Is Clear That There Was Danger to the Salvor During the Salvage Operation.

The testimony of the master of the North Queen was that his vessel approached within 200 feet of the Pioneer when the line was first taken [A. 91]. Berry testified that the vessel came to within 300 or 400 feet, on account of the kelp and rocks. The North Queen then backed out, and the danger from the rocks was over.

The North Queen was a purse seine fishing vessel. She was not equipped or built for salvage work. To use her for this salvage required skill and experience of an exceptional character. In part, such skill involved the rigging of the line from the North Queen to the Pioneer in such a manner as to enable the North Queen to be free to

maneuver, from side to side when working the Pioneer free.

The North Queen had a large sardine net on the turntable aft [A. 92-103]. The line from the Pioneer had to be lifted and held above the net, and then fastened to the bitts of the North Queen, which were just aft of the midship house [Libelant's Exhibits 4 and 5]. This method of rigging the towing cable endangered the entire rigging of the mast and boom and the men working under them. However, the danger was one that was necessary in order to give maneuverability to the North Queen [A. 121-125, 136]. The boom and mast could have come down and endangered the lives of the crew [A. 102, 212].

As to the cases cited by appellants:

The Tordenskjold, 255 Fed. 672, involved a tugboat that passed its tow line to the distressed vessel, encountered no danger in going up to the stranded ship, in fact she lay along side of her all night, and the tugboat was built and equipped to do the pulling that subsequently pulled the vessel free.

The Hesper, 18 Fed. 692, is far from the facts of the instant case—the Court stated, page 699, that:

“The labor and skill furnished were of the ordinary kind, such as libelant's boats (tugboats) were seeking as ordinary employment.”

In the cited case, the tug of libelant refused to take the risk of hauling out an anchor to help the distressed vessel. The Court further stated that but for an admission of the

respondent's proctor, the Court would have considered the case as towage and lighterage, to be compensated on principle of *quantum meruit*.

The Lucia, 222 Fed. 1015, likewise involved a pull by a commercial tug. No exceptional skill or seamanship was used by the salvor.

C. Danger to the North Queen Having Been Shown by Evidence in the Record, and Appreciation Thereof Having Been Demonstrated by the Trial Court, There Is No Cause for Reduction of the Award.

Each salvage case must be considered on its own facts. In some salvage cases, especially those involving commercial tugboats built and equipped for heavy pulls and tows, which cases appellants seem to cite especially, the element of skill and seamanship in the rigging of the tow lines and use of the vessel's equipment is not a factor at all in the saving of the distressed ship. The tugboats have extremely heavy hawsers which are made for heavy pulls. The tugboats are built with heavy bitts, placed to the stern, which allow the tug free maneuverability. In the tugboat cases, the element which most often calls for praise is that of danger to the tugboat.

But in this case, we have a light $\frac{5}{8}$ " wire cable, used to purse a fishing net, upon a vessel with light rigging, sufficient only for fishing.

It is submitted that the Trial Court was correct in deciding that the exceptional skill and seamanship of Xitco and Berry of the North Queen were responsible for the prompt freeing of the Pioneer.

Danger to the North Queen there was, but in *this* case, as contrasted to the tugboat cases cited by appellants, skill, seamanship and prompt action were the most important single factors.

In the case of *The Miskianza*, 27 F. (2d) 734, cited by appellants, the Trial Court had held that the tugboat-salvor had damaged itself through the master's fault and denied cost of repairs. The Circuit Court of Appeals held that the situation was dangerous, and that a salving vessel should be justified in working in dangerous waters, without too nice regard for her own safety. The Court raised the award because of this and because it thought the element of danger to the tugboat had not been evaluated, and because of the success of the operation and value saved. The case is far from being an authority for appellant's statement that danger to salvor is the most important single factor in determining the award. The distressed vessel was in a sand bar.

The Tordenskjold, 255 Fed. 672, contained no element of danger, skill, seamanship or anything that the Court could rely upon to justify the award. The work was done by a commercial tugboat that took care of its own tows at the same time it helped the distressed vessel.

Nor is *The Hesper*, *supra*, next discussed by appellants, any nearer on the facts. Appellants compare an award of \$4,200.00 made in 1883 with a \$12,000.00 award in 1948! The Circuit Court found that the salvage services rendered were of the lowest grade; also, the *Hesper* went aground on *sand*.

The next case cited by appellants, *Ulster S. S. Co. v. Cape Fear Towing & Transportation Co.*, 94 Fed. 214, is a tugboat case involving a vessel grounded on *sand*. The Court said, page 217:

“With the exception of the two occasions when the anchor was towed out . . . the work consisted of taking a line and tugging at the Torr Head. All of this work was done in fine weather and smooth sea, and without damage or particular risk to person or property. *The business of these boats was to seek towage in the waters where they were working on the Torr Head . . .* and both boats were engaged in their ordinary vocations during the whole time of this service.”

If such service was worth \$6,500.00 in 1899, the award here is certainly on the conservative side. The salvage operations were directed *solely* by the master of the Torr Head. The Circuit Court regarded this as most important.

In *The Santa Rosa*, 5 F. (2d) 478, the vessel ran aground *on a sand bar* at entrance to Charleston Harbor. Commercial salvage tugs worked on her and eventually pulled her free. There were no circumstances of danger, so that phase of salvage was not involved in the case. The award of approximately \$50,000.00, which was about 5% of the salved value of \$744,000.00 was *not* reduced by the Circuit Court. As values go up, percentages naturally must fall. The Circuit Court had this to say about the matter (p. 480):

“The law properly controlling in the reduction of and increasing salvage awards is in appellate courts well settled, and we need go no further than cite the recent decision of this Court in *The Nairwa*, 3 Fed.

(2d) 381, a salvage case from the Eastern District of Virginia, and the cases therein cited. An Appellate tribunal should not disturb a salvage award by a trial court, although it may feel that, if sitting on such court, a different allowance would have been made, unless convinced in what was done some principle of law was violated, or there was a plain and manifest error in the exercise of discretion in the conclusion reached."

The citation of *The Lucia*, 222 Fed. 1015, again is to a commercial tugboat that performed its usual work without incurring danger or exhibiting usual skill and seamanship. \$4,000.00, in 1915, was a good award. Again, this case involved a stranding on a *sand bar*, and the danger to the distressed vessel was not anywhere near as great as if she were on the rocks.

In *Rodriguez v. Bagalini*, 17 F. (2d) 921, next cited by appellants, the award of \$1,700.00 on \$17,000.00 salved value was reduced to \$500.00 upon the ground that the salvors were guilty of extreme bad faith.

To sum up, the Trial Court did properly evaluate the danger to the Pioneer stranded on rocks and the danger to the North Queen; that in this particular case, the feature which the Court properly gave primary consideration was the skill and seamanship that were so promptly used to save the Pioneer from pounding her bottom on the rocks; and that the citation of cases involving commercial tugboats and vessels stranded on sand bars are not helpful here.

III.

The Court Did Not Err in Finding That the Pioneer Was in Extreme Peril. The Weight of the Evidence Was That the Pioneer Should Have Been Pulled Off the Rocks Immediately to Avoid Fatal Damage. The Weight of the Evidence Was That the Pioneer Would Not Have Freed Herself With the Remaining Rise in Tide.

A. It Was Very Improbable That the Pioneer Could Have Freed Herself With the Rising Tide.

The evidence is without dispute that the Pioneer was traveling at about eight knots per hour [A. 195] when she struck the rock ledge known as Two Rock Point. The Pioneer ran up on the rocks for the full length of her keel, from stem to stern [Answer to Libelant's 9th and 10th Interrogatory—A. 18]. At the time libelant came up to her at 7:30 P. M., the water line at the bow of the Pioneer was somewhere between one to five feet out of the water [A. 52, 90, 132]. The Court thought [A. 52] that the true distance the bow rose out of the water when the Pioneer ran upon the rocks was somewhere between those two figures, at 7:30 P. M.

The tide tables showed that from 5:30 P. M. to midnight, six and one-half hours, there was a $5\frac{1}{2}$ foot rise in tide.

The North Queen came up at 7:30 P. M. At that time there was $\frac{2}{3}$ of the rise remaining, or three feet, eight inches, not five feet, as appellants state.

Considering that the testimony which supports the decree was that the bow was from three to five feet out of the water at 7:30 P. M., it is extremely doubtful if the remaining rise in tide would have been sufficient to float

the Pioneer, assuming that she would have sustained no damage in the intervening $4\frac{1}{2}$ hours.

However, it was during the ensuing hours that the Pioneer was in mortal danger.

The testimony on this vital point was as follows [Testimony of Andrew Xitco, Jr., R. 109-114]:

“Q. Now, in your opinion, what could reasonable have been expected to happen to the Pioneer if she had not promptly been pulled off the rocks and freed on the night you found her there? A. If she wasn’t pulled off and the tide was flooding, why, she would have a tendency to roll more and bounce more on the rocks below.

Q. And what would be the effect of bouncing and rolling on the rocks? A. It would puncture her sides and fill her with water. All she has is $2\frac{1}{2}$ and $2\frac{1}{2}$ ” planking.

* * * * *

A. Yes, and it is very important. If she would stay for a little longer, you couldn’t tell, she might puncture right there through her bottom, and her bottom showed it wouldn’t be long before she filled with water, just as a purse seiner we saw that went on at Point Arguello and the boat could have saved her, but the insurance company sent the tug and by the time she come back there, the owner lost the boat, a \$75,000.00 boat.

Q. Were the circumstances of that stranding similar to the Pioneer being stranded down here, a little?

A. Yes.

The Court: You passed by at the time of the disaster?

The Witness: We come by in the morning. It went on in the early part of the morning, and the

salvage tug was on its way up there. But I was on the rocks over at Clemente Island on the leeward side of the island. We went on the rocks after the tide went out, and as the tide started flooding, we started rolling around and we had severe damage on our hull as we towed in." [A. 113.]

"Q. By Mr. Lande: Now, assuming he went on at around 7:00 o'clock, that is, the Pioneer went on the rocks at around 7:00 o'clock, what effect would the rise in tide have upon the danger that the Pioneer was in? A. Well, as the tide started flooding, she would be in more danger. As we found her, as she stopped, she was practically fastened to the ground, and as she keeps getting on more water she would start rolling and moving up and down, and as the tide kept flooding, it would be getting worse.

The Court: Would she be worse with a flooding tide than with a receding tide?

The Witness: Yes.

The Court: Why?

The Witness: Because when she come on she stopped, and then as the water started coming in and kept rising, she would start floating a little, a part of the ship keeps rising.

The Court: Suppose the tide was receding, wouldn't it be the same?

The Witness: She wouldn't move at all. If she come on at high tide, in a matter of two or three hours she would be the same as lying aground,—because she was fastened there."

[Testimony of Matt Berry]:

"Q. Mr. Berry, in your opinion, what danger could reasonably be expected to the Pioneer if she

weren't promptly freed off the rocks that she was stranded on? A. I believe that with the rise in the tide and the slight increase in buoyancy that the Pioneer would suffer a greater damage to her hull, due to the position of the Pioneer on the rocks.

Q. What do you mean by 'due to her position'? A. Her position just almost horizontally to the beach, and due to the ground swell, the slight increase in the tide and the greater buoyancy, it would mean greater pounding against the rocks, and possibly could capsize, and the rocks just might puncture her hull in that type of vessel. Then their nets are all in one piece, and if the ship ever capsizes or sinks, that net will go down and sink, as she has no chance to free herself, which has been proven before.

Q. Was time an important element in freeing the Pioneer? A. I believe that time was an important element in freeing her.

Q. Explain to the Court why. A. Well, the longer that vessel stayed on the rocks and the more pounding she did, the more danger she would sustain to her hull, and, therefore, time was an important element." [A. 138, 139.]

"A. I said the vessel was rolling from side to side in my earlier testimony, and I believe the roll was from 5 to 10 degrees. With the rise in tide and the slight increase in buoyancy, the vessel is going to roll in a greater arc, and as she rolls in a greater arc she is going to do more damage to her hull because it was pounding on the rocks." [A. 142.]

"A. If you asked me to form an opinion, as I told you, I said in the additional four hours in that rise in tide I didn't believe it would cause enough rise to float that vessel. I don't believe so." [A. 143.]

“The Witness: That is correct. I assume that because of the vessels that I worked on in salvage when they were left on the rocks and there was an increase in tide, and they would always sustain more damage than if they were pulled off immediately. That is what I base it on. I base my statement on past experience. That is the only thing I have to go by, is past experience in similar cases.” [A. 144.]

[Testimony of Captain Myron Varnum, A. 154-161];

(Captain Varnum was given a hypothetical question giving the facts of the libelant's case, and then asked the following question):

“Q. Now, Captain, assuming that to be the situation of the vessel when stranded on the rocks, in your opinion what damage to the vessel could reasonably be expected to follow from the stranding? A. If she was left on there she would pound her bottom out.

The Witness: I said if you left her on there, on the rocks, and she was rocking on there, there was nothing to stop her from breaking her planks in and damaging her planks so that she would be a total loss if you did not take her off.

Q. Now, assume, Captain, that she went on at about 6:30 and assume that aid came to her at 7:30, and assuming now that your low tide was from 5:30 and from 7:30 on, as the tide rose a matter of maybe three or four feet, explain, please, how that rise in tide would affect the pounding of the vessel and working of the keel on the rocks, and the working of the surf, and of the ground swells on the vessel. A. Well, the tide is lifting the ship and gives her more buoyancy and so she pounds harder until she floats or pounds her bottom out and fills with water.

Q. Was time an important element in a situation like that, of the vessel I gave you in the hypothetical question? A. Absolutely.

Q. Now, explain to the Court what you mean by that. How much time, minutes or hours or what?

A. Well, I mean this, that he should get help as soon as he could to get off the rocks, and in the meantime, if help weren't coming, he should do what he could to get her off himself. But that is the first thing they should do, to try to get the vessel clear, and I would blame him if he didn't.

Q. In other words, in your opinion, Captain, could the master of that vessel, so stranded, with reasonable safety have waited for the high tide to float himself off? A. Well, I wouldn't have waited, if I could have got help. Anyway, he wasn't sure he could get her off at all with the help he did have.

The Court: Assuming after this salvage operation that the disabled vessel made her way to San Pedro under her own power without any difficulty. What would you say, then, about the imminency of her being destroyed by remaining on the rocks?

The Witness: Well, your Honor, it was the master's place to get the ship off the rocks just as soon as he could, in any way that he could, and the insurance underwriters would uphold him in doing it. If he had left her there he wouldn't know what would happen, he wouldn't know how much damage was under her, she might have punctured herself at any time and be a total loss.

The Court: Assuming that the disabled vessel after the incident that caused her to become stranded upon the rocks was extricated from the rocks and made her way to her port without any further assistance herself after she had been released from the rocks, would you think that the damage that had en-

sued to her bottom was such that she couldn't have been raised by the tide had she remained on the rocks?

The Witness: Well, I couldn't estimate that because you don't know how much damage was done while the tide was rising. As it was rising, she was going to pound harder." [A. 154-161.]

Cross-Examination of Captain Fritz A. Scheibe (Appellant's Witness) [A. 218-219]:

Q. Isn't it a fact, Captain Scheibe, when the vessel first went on the rocks, whether it was the Pioneer or any other vessel, and she strikes hard at low tide, she is held more or less securely in a grounding, isn't she? A. It depends on the condition of the bottom.

Q. All right. Let's suppose it is a rock bottom. A. Yes.

Q. And the vessel that goes aground shows damage along the entire keel way back into the rudder, and from the bow to the rudder,— A. That's right.

Q. —when she first goes ashore, she is held securely, isn't she? A. That's right.

Q. Now, if you have an incoming tide, so that you are getting a little buoyancy and there is a ground swell that is broadside, then your vessel begins to rock, doesn't it? A. Yes.

Q. And then she begins to work? A. Yes.

Q. And that is when the damage occurs, isn't it? A. Some damage occurs then, yes.

Q. Well, the amount of damage, of course, you don't know, do you? A. No.

Q. If there is enough buoyancy and enough ground swell, and if the rocks are present in the right position, she can puncture and flood and be a total loss? A. That's right.

Q. So you don't know, Captain Scheibe, that before she came free, and we are talking about the Pioneer,— A. Yes.

Q. —before she came free at high tide, you wouldn't know between the time she got stranded and high tide whether or not she would be punctured? A. No.

Q. She could very well have punctured, couldn't she? A. If there were rocks in that area, she could very well have punctured.

Q. You know under the hypothetical question that there were rocks in that area, don't you? A. I was told to assume there were rocks in that area. *If there were rocks in that area, she could have punctured, yes.*

Q. *Very easily?* A. Yes. (Emphasis added.)

Q. Probably if the vessel showed damage where her suction pumps were, even under the circumstances that did exist? A. Yes." [A. 218, 219.]

Thus, it appears from the testimony not only of the libelant and his witnesses, but also from the testimony of the respondent's expert that the Pioneer was in extreme danger and it was imperative that she be freed from the rocks as soon as possible to avoid mortal damage. Such being the case, the master of the Pioneer could not take the chance of waiting to see whether or not his vessel would go free at high tide, or sink in the meantime. The argument of appellants would have more sense to it if the grounding were on a sand bar, but in this case the grounding was on rocks, and judging from the fact that during the brief time the Pioneer was on the rocks the screens over the sea suction plates were damaged by coming in contact with rocks, and the tips of the propeller blades

were damaged by coming in contact with rocks, the Pioneer was amongst an uneven rock formation and the probabilities are that she would have punctured her hull before midnight.

B. The Pioneer Tried to Free Herself and Failed.

When the Pioneer first went on the rocks, she tried to get free herself, but did not move [A. 170]. Whether she could have waited for high tide, and whether high tide would have taken her off, or whether she would have in the meantime punctured and flooded, is a matter of pure conjecture. The Trial Judge said:

“So we have the peril of a ship that was *in extremis*. She was on the rocks. Whether she was fast or whether she was extricable is a pure matter of conjecture. The fact is she was extricated by the efforts of the libelant.” [A. 50.]

“ . . . I think the major factor was the maneuvering of the vessel, the salvor, and that had it not been for that movement the consequences that ensued to the disabled vessel might have been very serious. How serious I think is a pure matter of conjecture.” [A. 52.]

The situation is similar to the one in *The Wahkeena*, 56 F. (2d) 836, where this Court said:

“We likewise concur with the view that ‘The Court can only speculate as to whether the “Wahkeena” would have come off the jetty with the turn of the tide, and, if so, whether she would have been picked up by some other boat before again stranding.’ ”

The *Ulster* case, cited by appellants, is not in point. The case involved stranding on a *sand bar*. The vessel had an anchor and cable heavy enough to do the job, and

the bottom was sand, upon which the anchor could hold. But the uncontradicted evidence of Captain Varnum was that the light anchors of the *Pioneer* would not have held on the rock bottom, unless by chance they caught on a rock's projection [A. 224-226]. Furthermore, in the *Torr Head* case, the opinion states clearly that "the real services which put the *Torr Head* afloat were rendered by the master and crew of the *Torr Head*, using her machinery and appliances."

Surely that statement cannot in any fairness be said of the present case before the Court. The Trial Court found that it was the *North Queen's* services which put the *Pioneer* afloat, and there is no evidence that the machinery, appliances, master or crew of the *Pioneer* had any hand in the rescue.

The physical evidence in this case is that the *Pioneer* was amongst uneven rocks, and that the damage done by the rocking of the vessel, and the damage done in the stranding, was very extensive [A. 18—Answers to 9th, 10th and 11th interrogatories]. The cost of repairs was \$16,432.20.

The damage to the hull extended over the entire length of the keel, and the propeller blades and screens on sea suctions all showed damage. The screens on the sea suctions were about six feet high on the vessel's side up from the keel. That is definite proof that the vessel was rolling near rocks which were extremely close to the sides of her hull, and that another movement could very easily have punctured the hull.

The man who surveyed the damage was Captain Scheibe. On cross-examination he admitted [A. 215-219] the extreme peril of the Pioneer and that she was in danger of having her hull punctured at any moment.

“Q. This vessel was rocking quite a bit, wasn’t it, to smash the sea suction screens? A. Yes, and it didn’t crush them. It crushed the strainers.

Q. In order to crush the strainers she had to get over that far? A. Yes.

Q. Now, on your keel, that keel is 16 inches deep? A. Yes.

Q. And half of that was damaged? A. Yes.

Q. It takes a tremendous amount of rocking on those rocks to damage 8 inches by 12 inches of solid pine, does it not? A. A good bit of that might have been torn up when he went aground. I don’t know.

Q. It not only damaged his keel, but he had his hardwood and his iron shoe underneath damaged. And what did you say happened to that? A. It was torn off.

Q. It was torn off? A. Yes. That is spiked on.

Q. Now, this damage to his propeller blades, that would mean that his ship would have to roll enough so that the propeller blade would come in contact with the rock on the sides; isn’t that right? A. That’s right.

Q. And that propeller blade is protected underneath by the keel shoe? A. That’s right.

Q. So that we know, then, that the boat not only rocked enough to do damage to the suction knobs, but also to the propeller, as she rocked from side to side? A. *It could have been rocking and a rock be in the vicinity of the propeller.*

Q. Isn't it a fact, Captain Scheibe, when the vessel first went on the rocks, whether it was the Pioneer or any other vessel, and she strikes hard at low tide, she is held more or less securely in a grounding, isn't she? A. It depends on the condition of the bottom.

Q. All right. Let's suppose it is a rock bottom. A. Yes.

Q. And the vessel that goes aground shows damage along the entire keel way back into the rudder, and from the bow to the rudder,— A. That's right.

Q. —when she first goes ashore, she is held securely, isn't she? A. That's right.

Q. Now, if you have an incoming tide, so that you are getting a little buoyancy and there is a ground swell that is broadside, then your vessel begins to rock, doesn't it? A. Yes.

Q. And then she begins to work? A. Yes.

Q. And that is when the damage occurs, isn't it? A. Some damage occurs then, yes.

Q. Well, the amount of damage, of course, you don't know, do you? A. No.

Q. If there is enough buoyancy and enough ground swell, and if the rocks are present in the right position, she can puncture and flood and be a total loss? A. That's right."

The next case cited by appellants is the *Edith L. Allen*, 129 Fed. 209. It is distinguished from the present case for the reason that here there can be no doubt of the extreme danger to the Pioneer. Not only the testimony of Xitco, Berry and Varnum established such danger, but even the appellants' "expert" witness, Scheibe, the surveyor, admitted the danger and the damage sustained from that danger during the short time before the Pioneer was pulled free.

Therefore, the question as to whether the Pioneer could free itself depended upon conflicting evidence, that the Trial Court's conclusion in this matter cannot be disturbed on appeal. The evidence is without conflict that the Pioneer was in mortal danger subsequent to the stranding. The evidence amply supports the Finding of Fact that the "efforts of the North Queen and crew were the prime and major factor which resulted in the freeing and extricating of the Pioneer from the rocks." [A. 59.]

The Pioneer could not afford the risk of waiting for the high tide. She was in such danger, stranded amongst rocks and rolling broadside to the ground swells, that she may never have seen high tide—except from the bottom of the sea. This was a *real and existing danger*, a danger which had already done \$16,430.00 of damage to her hull, a danger which had already reached the sides of the vessel (damage to screens on sea suction, six feet up the hull from the keel; and damage to the propeller, which could only have resulted from hitting rocks on the *side* of the propeller, as the underneath is protected by an extension of the keel).

The finding that the Pioneer could not free herself by her own means is fully supported by the testimony of her master [A. 170]. He tried to back up three times and couldn't get off. His anchors were not used; even if they had been, they were too light [A. 19] for use on the rock bottom, he would merely have heaved them home; the chance that they might catch on a rock is too indefinite to compel a finding contrary to the Court's finding in this regard [A. 224-226].

IV.

The Loss of a Night's Fishing Was a Detriment to the North Queen.

The North Queen was a purse seine fishing vessel whose value, including net, was \$135,000.00. She carried a crew of eleven men. This vessel, representing such a large investment, was engaged in fishing for sardines during the regular sardine season, as was the Pioneer. The North Queen gave up a night's fishing to go to the aid of the Pioneer. True, no one knows what the North Queen would have caught in her nets. But the *chance* to fish that night was of economic value to the North Queen, and it was that chance to catch fish which was lost.

The Court rightly considered this factor when he said [A. 53]:

“In any event, there was no evidence excepting the fact that an inference is fair, I think, that a fishing boat of that size with a crew of eleven men, going down in those waters to fish on lays, would not have been out less they felt there was a fair prospect of a catch that night. The catch was abandoned because of the desire to assist in saving the ship after she had been disabled.”

The next case cited by appellants is that of *Atchison, T. & S. F. Ry. Co. v. California Sea Products Co.*, 51 F. (2d) 466, which is distinguished from the present one in that the cited case involved a floating whale factory, a new business and wholly untried, that the libelant had never been engaged in whaling in the San Clemente waters or that anyone else had, and that there was no evidence that

whaling was a seasonable occupation in San Clemente waters. In the present case, the North Queen was engaged in fishing operations for sardines in the midst of the season, as were the Pioneer and the Sunlight, in the waters involved. As to such a situation, this Court in its opinion referred to the case of *The Columbia*, Fed. Cas. No. 3,035, where allowance was made for the catch lost because the accident happened “at the height of the fishing season.”

V.

The Exceptional Skill and Seamanship of Appellee, and the Extreme Peril of the Pioneer, Were the Outstanding Characteristics of the Salvage Operation.

A. The Crew of the North Queen Handled Her With Exceptional and Unusual Skill and Seamanship, Which Resulted in the Freeing of the Pioneer.

The appellants make the statement that the services of the North Queen involved “nothing extraordinary or unusual.”

The Trial Court made a finding, VI and VIII [A. 57-59], that by the use of great skill and ingenuity, the master and crew of the North Queen were able to pull the Pioneer off the rocks, and that the services rendered were of a high order of merit; that their manner of working the vessel off the rocks showed real seamanship in an emergency and exceptional skill based on experience of a high type; and that such efforts were the prime and major

factor which resulted in the freeing and extricating of the Pioneer from the rocks.

What has been written in this brief so far of the evidence amply supports the Court's finding. The testimony of Xitco [A. 101-120], Berry [A. 135-140] and Varnum [A. 151-164] fully justifies the Court's finding. As Berry said [A. 138] of the technique used by the North Queen:

"I learned that by experiment in similar salvage operations. I learned that in the salvage of LSMs and LCTs, vessels that were stranded on the mud and on the coral beaches and we had difficulty in taking those vessels off in amphibious operations. So we experimented with that theory, and that was the theory we used on the Pioneer. We found it very successful in the Philippines."

That the rising tide was only a contributing factor, the Court so decided. The Trial Court said [A. 52]:

"I feel that the buoyancy of the sea itself was a contributing factor, but the movement of the leverage maneuver was, I think, the prime cause of extricating the Pioneer. I believe the result was partially assisted by the buoyancy, but the movement of the sea itself, during the tide period that was involved in the movement. How much each contributed it is difficult to say. I think the major factor was the maneuvering of the vessel, the salvor, and that had it not been for that movement the consequences that ensued to the disabled vessel might have been very serious. How serious I think is a pure matter of conjecture."

The Naivva, 3 F. (2d) 381, next cited by appellants, involved the services of the salvage tug of Merritt and Chapman. Salvage was her business, and the business of libelants in that case. In the present case, it was the skill and seamanship, over and above that of fishermen, that enabled Xitco and Berry to save the *Pioneer*. What could be usual and expected skill in a salvage company like Merritt and Chapman, would be most unusual and unexpected in the master and crew of a fishing vessel. The award made by the District Court was for \$67,500.00 on a salved value of \$1,200,000.00; about 5%.

In *The Professor Koch*, 260 Fed. 969, next cited by appellants, involved a vessel that had struck a ledge lightly and slid into a depression on it, which held it like a cradle with no immediate danger. The libelant was in the tug-boat business, and in answer to a telephone call, he sent two tugs out to the vessel to help her, and a third later at high tide. The three tugs pulled her free easily. She was taking water, however, so they beached her and later moved her inside the breakwater. After her hull was patched and she was pumped out, she was towed to Boston. The District Court thought it was (p. 970) "essentially a towing operation" and allowed the tugs \$10,000.00, which was over four times the commercial rate for the hours involved. There was no element of exceptional skill or seamanship in the *Koch* case that makes it at all comparable to the one at bar.

The danger and peril of the *Pioneer* has been discussed by appellee under Point III above.

VI.

The District Court Did Not Err in That It Made an Award That Was Appropriate and Proportionate to What Courts Have Heretofore Awarded in Like Cases.

A. The Criteria to Be Followed by Appellate Court.

The criteria to be followed by the Circuit Court in passing upon the amount of the salvage award has been well stated in the case of *The Nairwa* (C. C. A. 4th), 3 F. (2d) 381:

“This court undoubtedly has the right in an admiralty case to increase or decrease the amount of the salvage award made by the trial court, but the principles upon which this should be done are well and definitely settled, viz., that because we think that perhaps as trial judges we would have reached a different conclusion from the one arrived at, still that should form no basis for our disturbing the finding, unless under all the circumstances we are convinced that the court whose judgment is under review was so far in error as to have violated some principle of law or had plainly erred in exercising its discretion in fixing the amount of the allowance. This is the correct rule by which we should be guided, and authorities to support the same are readily at hand, indeed, the question is fully covered by recent and previous decisions of this court (citing cases).”

B. The Award Is in Line With the Decided Cases of Salvage.

Appellees will first analyze the cases cited by appellants; however, decided cases have a limited use in determining the amount of an award. As stated in the case of *The Craster Hall* (C. C. A. 5th), 213 Fed. 436, 437:

“To determine whether services rendered to a ship in peril are strictly salvage services, and whether

salvors are entitled to be rewarded therefore in admiralty, adjudged cases are of great help in reaching a correct decision, and the same may be said to many other questions arising in salvage cases; *but, where the amount of award is the only vital question, very little assistance is obtained by study and analysis of the facts in other salvage cases.*" (Italics added.)

In *The Bay of Naples* (1891), 48 Fed. 737, the salved value was \$81,400.00 and an award of \$12,000.00 was made by the Court, approximately 17%.

In *Canadian etc. v. U. S.* (1925), 7 F. (2d) 69, the Court said of the salvor's services: "The service was of almost the lowest order of salvage; it was a simple harbor service. . . ." Any award made could not fairly be used as a measure of comparison in this case.

Huasteca Pct. Co. v. 27907 Bags of Coffee, 60 F. (2d) 907 (1932), involved a cargo of a stranded vessel. On \$343,000.00 valuation of cargo, the District Court awarded 20%, which was reduced to \$30,000.00, or about 10%, on appeal. The facts of that case and the present one are not similar.

In *Simpson v. Dollar*, 109 Fed. 814, the District Court found that in "rendering the services for which salvage was claimed, no extraordinary effort was put forth by the Columbia (salving tug), and that neither the tug nor any of her crew was exposed to the slightest danger in making fast to the steamer or towing her to a place of safety; that the ordinary charge for such towage would be about \$175.00." An award of \$7,000.00 was made, but that case is far from the facts of the present one.

In *The Hesper*, 18 Fed. 692, the Court said, page 699:

“The labor and skill furnished were of the ordinary kind, such as libelants’ boats (tugboats) were seeking as ordinary employment.”

The Court further stated that but for respondent’s admission, it would have considered the case one of towage and lighterage, to be compensated for on principle of *quantum meruit*. The case is typical of those cited by appellants as authority for their argument that the present award exceeds “those which have been customary for like services.” How can an award of \$4,000.00 made in 1883 be compared, dollar for dollar, with an award made in 1948?

Also cited is *The Lucia* (1915), 222 Fed. 1015, involving a pull of a commercial tug, not incurring any danger and not exhibiting any particular skill or seamanship; *Ulster S. S. Co. v. Cape Fear etc.* (1899), 94 Fed. 214, has been analyzed as to its dissimilar facts, and \$6,500.00 in 1899 was worth more than three times that sum in 1948. In the case of *De Aldamitz v. Theo. Skogland & Sons* (1927), 17 F. (2d) 873, an award of \$5,000.00 was made on salved value of \$60,000.00. The proportion of \$5,000.00 to \$60,000.00 is much the same as \$12,000.00 is to \$112,567.00. But, when the \$5,000.00 of 1927 is adjusted to its 1948 value, the sum paid for the services was much greater in 1927.

On the relative value of the dollar, the Fourth Circuit Court had this to say when comparing salvage awards in 1918 in *The Kia Ora*, 252 Fed. 507, 511:

“It is to be considered also that the award of \$100,000.00 was of hardly more value or greater encouragement for such service than an award of \$50,000.00 would have been ten years ago.”

In *Simpson v. Dollar* (1901), 109 Fed. 814, next cited by appellants, the Court recognized the award as too low, so why use the case as a measure for comparison?

Salvage awards cannot be compared only upon the basis of values involved. As stated in the *Blackwell, supra*, there are five other elements that must be considered, yet throughout appellants' brief this elementary mistake is made. Typical illustrations are the next two cases cited by them, *The Tordenskjold*, 255 Fed. 672 (1918), where there was involved no element of skill, seamanship or danger, or anything else the Court could rely upon to justify the award. The work done by a commercial tugboat that took care of its own tows while engaged in helping the distressed vessel; and the *Societa, etc., v. Maru Nav. Co.* (1922), 280 Fed. 334, where the Court expressly stated that (p. 337):

"This, then, is not the case of assistance which is at once voluntary and against self-interest, but distinctly the case of assistance, which, although voluntary in a legal sense, is at the same time of direct and important benefit to the one by whom it is rendered. And this essential difference should be reflected in a materially less award than otherwise would be allowable."

Yet the appellants compare the awards in such dissimilar cases with the one before the Court now.

The next case cited by appellants is that of *Richfield Oil Co. v. Currey, et al.* (C. C. A. 9th), 55 F. (2d) 875. The element that greatly impressed the trial court, as expressed in his opinion in 47 F. (2d) 235, was the readiness to assume danger in going to the aid of the burning vessel. The salving vessel was a commercial tug, and she towed the vessel from the dock into the open waters of the

harbor. The Trial Court awarded \$11,000.00 salvage and said, 47 F. (2d) at p. 238:

“The award has been lessened by the grossly exorbitant demand of the crew in the ship’s arrest, \$150,000.00, and also the excessive claim of the tug, ‘one-fourth of the ship’s value’ . . .”

We do not know what the award would have been if the demands were held to be reasonable. So how can that case be compared to this? Furthermore, even with the above depreciating factor in the cited case, \$11,000.00 in 1931, at the depths of the depression, was worth well over twice that in terms of 1948 buying power. This Court said, 55 F. (2d) at p. 876:

“. . . it is obvious that Judge Neterer, who tried the case in the court below and who has had a wide experience in admiralty law, gave full and careful consideration to all the elements properly involved in determination of the salvage awards (citing cases). In *Malston Co. v. Atlantic Transport Co.* (C. C. A.), 37 F. (2d) 550, 571, the court said: ‘. . . We would not be justified in reversing his findings unless we are prepared to say that they are clearly wrong, which, under the record here, we certainly could not do. His findings are supported by evidence, and, while there is some evidence to the contrary, it is not such as would justify a reversal.’”

Appellants next cite, as a “somewhat similar case,” *The St. Charles* (E. D., Va.), 254 Fed. 509 (1918). The distressed vessel was stranded on a sand bar. The salvor came to her aid and promptly pulled her off. The District Judge said (p. 510):

“The wind was moderate, the sea smooth, and good weather conditions generally favorable to the success-

ful completion of the service, prevailed. *No particular skill was required*, nor hazard or danger incurred.” (Italics added.)

The Trial Judge here has expressly found that there was an extremely high degree of skill and seamanship employed by the appellees, and the great weight of the evidence supports his view. Therefore, the absence of that factor from the *St. Charles* case, and its presence here, distinguishes the cases. Again, \$15,000.00 was awarded in 1918, which, to be compared with an award this year, must be adjusted.

Appellants next cite *The Agwisun* (C. C. A. 2d), 49 F. (2d) 263. This case involved a tank vessel tied up at a repair dock. A fire broke out on deck, and the salvor came up promptly and played two hoses on the fire area. The opinion of the District Court, 43 F. (2d) 721, discloses that there were also present two fire boats and a land company. The Court said (p. 722):

“The service did not require a high order of skill, but was rendered with promptitude and diligence.”

In *The Egbert H.*, 131 F. (2d) 111, the statement of the Court will serve to distinguish it from this one:

“The entire salvage operations consumed only fifteen minutes, and the towage value of the services rendered was \$15.00. The risk to the Cynthia No. 2 and her crew was negligible, her inconvenience slight, and she owed a legal duty to respond to the distress signal.”

The Bretanier (1920), 267 Fed. 178, involved a vessel grounded on soft bottom off the coast of Virginia. The salvage tug of Merritt & Chapman went to the scene,

and laid two heavy anchors, with the aid of which, the steamer was able to extricate herself. The Court judged the case on the basis of "the time employed and the values involved" (p. 179), having held that there was no danger to *either* vessel. Here, under the evidence, it cannot be seriously denied that there was imminent danger to the Pioneer on the rocks, and the Court found that there was also danger to the North Queen, which finding is supported by evidence. Nor was there any element of exceptional skill or seamanship present in the cited case.

In *U. S. v. Central Wharf, etc.* (C. C. A. 1st), 3 F. (2d) 250, the award was for \$15,000.00 upon a salvaged value of \$70,000.00. Of the \$15,000.00, only 3/5, or \$9,000.00 was awarded to the private salvor, the other 2/5 being withheld for the services rendered in the salvage of a coast guard vessel. The case certainly does not support appellants' position.

The City of Portland, 298 Fed. 27 (1924), is wide of the mark. That case involved a vessel at New Orleans; she was being towed by two of libellant's tugboats when her propeller shaft snapped out and water entered the opening. The tugs beached her. The Circuit Court held that the services in beaching her were salvage, but the Court had this to say as to the measure of the *amount* of the award (p. 30):

(Quoting from *The City of Haverhill* (D. C.), 66 Fed. 159. . . .) "This was an extraordinary service, because not within the scope or contemplation of the (towage) contract. It should therefore be compensated for on salvage principles. But the equitable relation of the parties in such cases, where the tow is all the time in charge of the tug, *requires I think, the allowance of a much less compensation than would be proper to be given to an independent tug.*"

Furthermore, the Court said (p. 301) that inasmuch as the accident happened in the harbor and the vessel was “in danger from possible, *but undisclosed*, perils of the sea, the allowance in this circuit to a salvaging tug usually has been fixed at double the towage rate.” A decree was so computed. Can an award so computed be *fairly* compared with one under the facts of the *Pioneer* case?

Appellants’ next cited case is *Holmes v. City of New York*, 30 F. (2d) 366, wherein the Circuit Court had this to say of the services rendered:

“While the adventure came within the category of a salvage service, it involved little more in risk and effort than towage, and the fire was so slight that it did no real injury.”

The Professor Koch, 260 Fed. 969, cited next, is likewise a case involving commercial tugboats. The District Court had this to say of the facts of the case (p. 970):

“This completed the first stage of the salvage operations, which consisted in taking the barque from her position on Cox’s Ledge to the position inside the breakwater. It was essentially a towing operation, not involving the use of wrecking apparatus or any special appliances, and not especially endangering the tugs—the barque was then towed to Boston—the per diem value of their services at their customary rates would have amounted to about \$2,300.00. . . .”

“The principles upon which the award is to be made are well established. Most of the elements which lead to large awards are conspicuously absent in this case. The libelant did not discover the wreck; it was notified over the telephone, and took the matter up in a business way.

“Concisely stated, what the libellant did on April 30th was to receive word over the telephone that the barque needed assistance, to dispatch tugs promptly to the place of accident, . . . The case is very different from that of a vessel deviating from her voyage to render assistance, or struggling with a wreck in a stormy sea at risk of life.”

The Court awarded \$10,000.00, which was more than four times the commercial value of the tug's work.

The High Cliff (C. C. A. 2d), 271 Fed. 202, is next in point. The following language from the opinion serves to distinguish the case from that of the *Pioneer* (p. 204):

“In the case now before the Court the value of the services rendered by the tug are to be distinguished from cases involving rescue of vessels in open water, accompanied by great danger to life and property, *or where the salvors display great daring or skill.*”

The Santa Barbara, 299 Fed. 152, involved a vessel in a harbor, aided by two tugboats when they pulled her away from a burning pier. Skill was required in the maneuvering of the tugs, and a \$1,000.00 award was raised to \$8,500.00. The Court made an analysis of the *five* cases of salvage, in harbor. A reading of this case discloses that awards of from 10%, on lower salved values, to 5%, on values over \$200,000.00 to \$300,000.00, were customary. Considering that cases involving tugboats in harbors are the lowest on the salvage scale, the award in the *Pioneer* case compares favorably with these *five* cases. Of course, appellees do not believe the percentage method is the proper method to either compute or compare an award. Percentage of award to salved value, as the Trial Judge said [A.

53-54], should not be left entirely out of consideration, but the award should not be on that basis alone.

The Peru, 99 Fed. 783, was decided in 1900. At that time, \$2,500.00 to the tug for what was done was a handsome award—the case cannot be compared on its facts to the present one—certainly an adjustment in the value of the salvor would be first required.

The Niagara, 89 Fed. 1000, was decided in 1898. The \$8,000.00 award must be considered according to the value of the salvor then. Also, the award was about 6½%, and if we increase the salved value to present day values, by multiplying by at least three, we have a salved value of around \$350,000.00, upon which sum awards now have dropped to 6% in certain cases. But by the same figuring, the award today would be around \$24,000.00.

In *The Labrador*, 39 Fed. 503, the Court said (p. 504):

“The steamer herself was in peril, but there was no serious peril of the total loss of the cargo by fire. . . . In view of all the circumstances, I am unable to award salvage compensation to the McCaldin upon the theory that by her efforts nearly a million dollars was saved from destruction.”

Appellee cites the following cases as more helpful in this case:

Dalzell v. Central Union Stockyards, et al. (D. C. S. D. N. Y.), 1935 A. M. C. 1048, 12 F. Supp. 179.

Tug Dalzellea aided cattle barge damaged in collision in New York Harbor. Barge towed to dock, cattle unloaded, and barge towed to yard. Skillful manner in which Dalzellea closed hole in the hull of the barge. Salved value,

\$86,404.00; value of Dalzellea, \$65,000.00; award, \$6,000.00.

“It is true that the entire operation in which the Dalzellea and her crew was engaged only lasted from about 7:55 to 11:30 A. M., and period of greatest danger lasted something less than 30 minutes. But the time element as a basis of award in an instance of this particular character is not the important factor; nor should this be looked upon as a mere harbor salvage where the risk to the salvor and the need of aid is ordinarily less urgent and the operation less dangerous than upon the high seas. The fact that the rescue was completed in a comparatively short time does not lessen the merit of service under the circumstances. *Connemara*, 108 U. S. 35; *West Mount*, 277 Fed. 168 (2 C. C. A.).”

The Commonwealth, 1932 A. M. C. 199 (D. C. W. D. Wash. N. D.). Distressed vessel pulled off reef. Salvaged value, \$12,000.00; salvor, \$7,000.00; \$1,500.00 salvage award.

Rustad v. Wuori, 157 F. (2d) 448;

The Kia Ora, 252 Fed. 507 (1918) (C. C. A. 4th);

The Craster Hall, 213 Fed. 436;

The Cleveland, 1933 A. M. C. 1557 (D. C. E. D. N. Y.);

The Wahkeena (C. C. A. 9th), 56 F. (2d) 836;

De Aldamiz v. Theo. Skogland & Sons, 17 F. (2d) 873.

Conclusion.

Appellee submits that each salvage case must stand on its own facts, and that there is no controlling rule of thumb for measuring the award; that no formula can be devised which will meet the justice of every case. *The Craster Hall*, 213 Fed. 436. The percentage basis is unsatisfactory because its application to large values would lead to obvious injustice. *The Kia Ora*, 252 Fed. 507, 508. Where the values are small, the same result would follow.

The case rests within the sound discretion of the Trial Court, exercised according to law.

Appellee submits that the Court correctly applied authoritative standards and correct principles in determining the amount of the award; that there was no misapprehension of the facts; that there is no substance to the claim that the award here was grossly excessive; and that, therefore, the decree of the District Court should not be disturbed on appeal.

Appellee closes with the following quotation from *U. S. v. S. S. Balto*, 1929 A. M. C. 292 (2 C. C. A.):

“In a careful opinion a competent trial judge has thoroughly considered the various elements which may properly be taken into account in rewarding salvage services. Under such circumstances an appellate court is loath to change an award unless it appears to be based upon incorrect principles, or a misapprehension of the facts, or seems so grossly excessive or inadequate as to be deemed an abuse of discretion. (Citing cases.) None of these conditions exist here. It would

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APPELLANTS' REPLY BRIEF.

MCCUTCHEEN, THOMAS, MATTHEW,
GRIFFITHS & GREENE,

HAROLD A. BLACK,

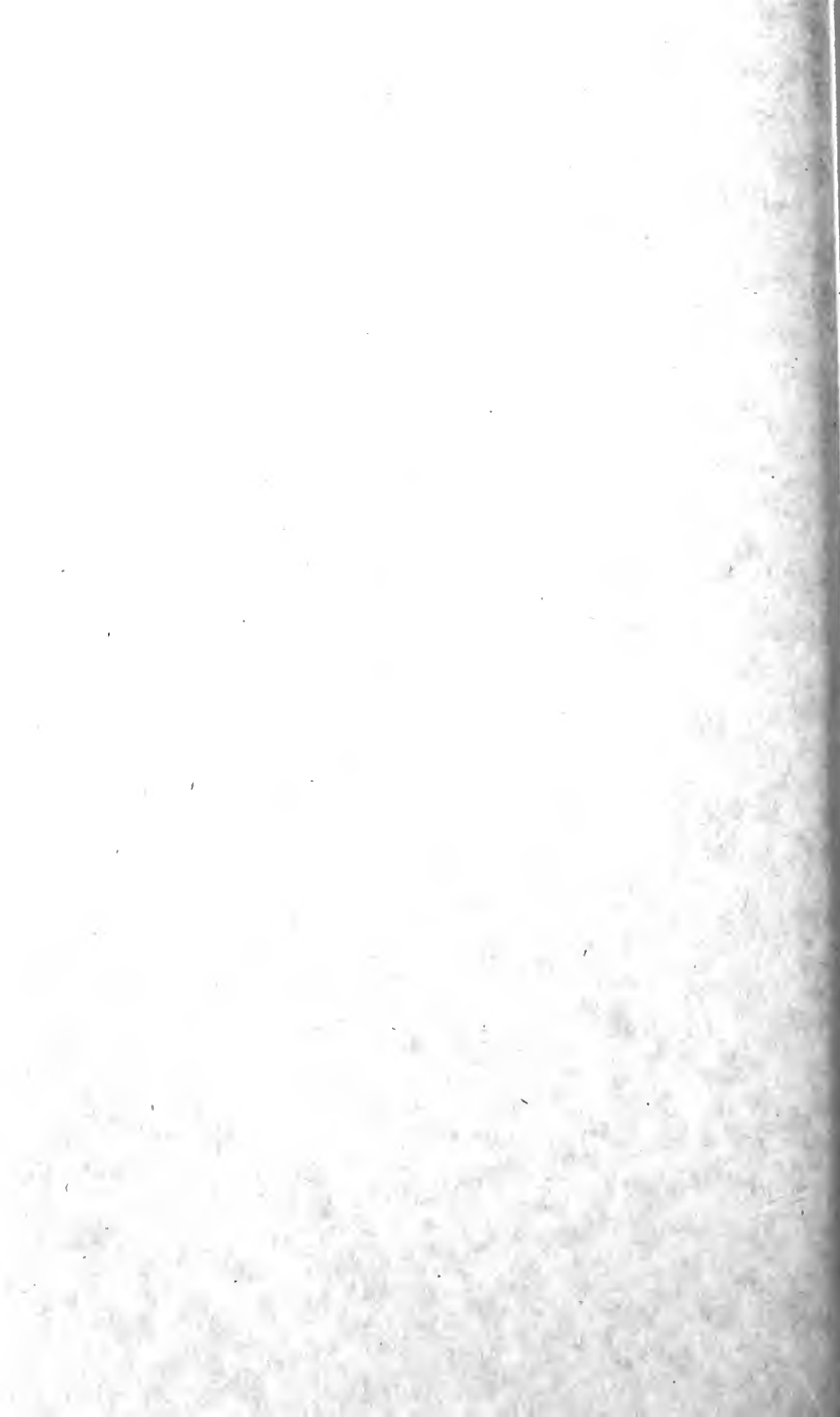
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APPELLANTS' REPLY BRIEF.

I.

Introduction.

We are concerned in this case with an award of \$12,000 for an hour and a half or two hours' services to a vessel worth about \$112,000, in calm weather, without substantial danger to the salvor. It can hardly be disputed, and—so far as we can tell from appellee's brief—it is not disputed, that this is a very large award.

It is our contention that the size of the award is due to various errors and is itself an error. Appellee has sought to meet our contentions in respect to these errors in various ways, to which we will advert hereafter. But, *appellee has made no substantial attempt affirmatively to justify the award for the services.* He has denied the

merit of our criticisms, and he has denied the applicability of the precedents we have cited. *But no precedents of comparable awards for like services to vessels of like value are referred to.*

If there had been prior authority for this award, we may be sure that we would have heard of it. Taken on appellee's own showing, this award is, as we have contended, without precedent. An award which departs from "the path of authority" is erroneous. This one is over four times greater than could be justified under any comparable case of which we are aware.

It is true, as counsel states, that every salvage case stands on its own facts, and that there is no rule of thumb that can infallibly produce a just result in every situation. But this does not mean that precedents will be altogether ignored. On the contrary, as we have pointed out in our opening brief, even if there were no other error, an award that departs widely from the general pattern marked out by the reported decisions may and should be modified for that reason alone.

But here there *were* other errors—errors which require the reversal of the District Court's decision, and call for the reappraisal of the award, unfettered by any principle that a trial court's discretion will not be lightly disturbed.

II.

Appellee Concedes the Materiality of Other Assistance, and That This Was Not Considered: His Counsel's Consideration of Other Assistance Is No Substitute for Consideration Thereof by the Court.

The first specific error of law urged by us is that the trial court erred in failing to consider the availability of assistance by the SUNLIGHT. The error is of twofold significance: *first*, as itself comprising a reason for excess in the award and an occasion for reduction of it; and, *second*, because if such an error of law was made, the award is reviewed without benefit of presumption as to correctness.

Counsel for appellee does not, of course, assert that this factor was considered, since no reference is made to it in the opinion or the findings. And, he concedes that it is a factor which should be considered. He states:

“Availability of other assistance is just one of the factors *to be considered in making a salvage award.*”
(Appellee's Br. p. 5.)

And again, he states on page 9 of his brief that other assistance is “a subsidiary factor, *not to be ignored*, but not to be given great weight.”

We do not contend, of course, that the availability of such assistance is the sole factor to be considered. We agree with counsel that it is one of the factors which should be considered, and that certainly, in his words, it is “not to be ignored.” We do not know just what counsel means when he states that it is not to be given great weight—in *The Monticello* (D. C., N. D. Cal.) 81 Fed. 211, it was stated to be “an important element”; in *The John J. Howlett* (D. C., E. D. Pa.), 256 Fed. 971, 972, it was said to be a “feature of importance”; and in *The Wahkeena*, 56 F. (2d) 836, this Circuit Court of Ap-

peals stated that availability of other assistance was a matter which goes "to the value of the appellee's services." This is weight enough for us. The decisions of this Court in *Rodrigues v. Bagalini*, 17 F. (2d) 921, and in *The Loch Garve*, 182 Fed. 519, are clear enough that, if the trial court ignores matters which "should not be ignored," its award will be modified. What other result, indeed, could follow?

Appellee criticizes us for citing harbor salvage cases as bearing on the significance of other assistance. But the foundation of the rule that harbor salvage carries a low rate is the fact, as has many times been stated, that assistance is abundant in harbors, and this plainly appears in the very quotation taken by appellee from *The High Cliff*, 271 Fed. 202, at page 7 of appellee's brief. It is there said that services in harbor cases "*where tugs are abundant*" carry a low rate. Abundance of assistance does not lose its value outside the harbor entrance. In fact, the cases cited by us in this connection for this Circuit, *The Monticello* and *The Wahkeena*, are not harbor cases.

Appellee also criticizes our citation of certain cases because they involve tugs. But, if assistance by a tug carries a lower rate when other tugs are available, and assistance by a steamer carries a lower rate when other steamers are available, surely the value of assistance by a fishboat is affected when another fishboat is standing by and has put a line on board. The improvement in the relative position of a vessel in distress brought about by the availability of two vessels to aid it, instead of one, remains the same. The principles applicable do not differ for fishboats.

Since concededly availability of other assistance "should not be ignored," counsel attempts to supply the lack of such consideration by providing it himself and, after weighing the evidence himself, comes up with the conclusion that the assistance offered by the SUNLIGHT was

not worth anything. Counsel's consideration is no substitute for consideration by the District Court.

But, since the failure of the trial court to consider this factor requires a re-appraisal of the award, counsel's argument as to the value thereof should be considered. His major premise is that extraordinary skill was required to free the PIONEER. His minor premise is that there is no evidence that the SUNLIGHT had such skill and would have employed the same maneuvers as were employed by appellee. His conclusion is that, since we can only conjecture as to what the SUNLIGHT could do, we cannot consider her help as of value.

The major premise that "The record is clear that ordinary seamanship could not do the job . . ." is supported by a reference only to pages 101 and 102 of the record, which contains only the testimony describing the breakage of the cable the first time. On a rising tide, the failure of a first attempt and the success of a second is no demonstration of any *need* for extraordinary skill, even if, in fact, the second maneuver was more skillful than the first. Counsel goes on to say "without great skill, a $\frac{5}{8}$ -inch cable could not stand the strain, nor was a purse seiner fishing vessel powerful enough."

There is no testimony to this effect in the record and counsel refers to none. The closest equivalent is testimony by appellee's expert, Captain Varnum, and appellants' expert, Captain Scheibe, that if the PIONEER was stranded with its bow waterline out of water 3 to 5 feet, as appellee's witnesses testified, the PIONEER *could not be pulled off at all* with such a wire, even by appellee's maneuver. [A. 162, 207]. We have already discussed this testimony in our opening brief at pages 39-40, and counsel has had nothing to say thereof. Its significance, as we there point out, is that it establishes the impossibility that the PIONEER was in the position claimed by appellee, and proves the primary significance of the rise in tide in causing the

success of the second attempt. This is directly contrary to counsel's contention as to the need for special skill.

Counsel's minor premise is that there is no evidence of special skill on the part of the SUNLIGHT. He claims a wisdom not possessed by the men on the spot. The master of the SUNLIGHT testified (as set forth on pp. 15-16 of our opening brief) from his familiarity with the SUNLIGHT that she was capable of assisting the PIONEER [A. 34]. He testified that the SUNLIGHT "had a regular towing bitt" [A. 34],—while on the other hand counsel apparently claims that the NORTH QUEEN was not equipped for towing. The men on the PIONEER promptly took a line to the SUNLIGHT upon her arrival. These seasoned mariners on the spot clearly thought her services of value.

The testimony of the SUNLIGHT was taken by deposition. At the time that deposition was taken no issue of special skill was tendered; for the libel claims no special services on the part of any seaman except the master—who appellants knew was an experienced fisherman. The flat testimony of the SUNLIGHT men is that they were able to help and, while appellee could well have attended at the deposition and tested this assertion by cross-examination as to their skill, he did not, and their testimony stands uncontradicted and unimpeached.

Counsel's conclusion is that since we do not know what assistance she would actually have rendered, it cannot therefore be an important element. But, this difficulty is inherent wherever availability of other aid is considered. Thus in *Societa Commerciale Italiana Di Navigazione v. Maru Nav. Co.* (C. C. A. 4th), 280 Fed. 334, the other vessels considered were merely passing by—the court could not possibly have known their skill, yet it reduced an award in part because of this factor. One can never know whether other vessels present will prove to be more

skillful or less skillful in actual maneuvers, than the actual salvor. But, if others are present, the salvor can accept their aid instead of running unusual risks: if others are present, the danger of the assisted vessel is reduced because it is not limited to the means of a single boat: if others are present, less skill is needed because more power is available. Hence, under the cases, the availability of other assistance reduces the award. In the present case, the *SUNLIGHT* was there—it had gone so far as to take a line; it was in fact the first vessel to answer the distress call of the *PIONEER*. Its presence “should not be ignored.” Yet it *was* ignored, and as this Court has pointed out, it is error to ignore so material a factor.

III.

Appellee's Contentions Point Up the Lack of Consideration of Danger to Salvor, Ability of *PIONEER* to Free Herself, Lack of Expense to the Salvor, and the Overemphasis on Appellee's Skill.

We have urged as further errors lack of consideration given to the freedom from danger of the salvor, to the ability of the *PIONEER* to free herself, to the very small expenditure of time and lack of expense by the salvor, and overemphasis of appellee's skill. These are all material factors under all of the decided cases. The contentions made by appellee only make more emphatic the deficiencies existing in these respects. We will take these up in order.

First: Lack of danger to the salvor was not considered.

There are no findings of danger to the salvor. Under Admiralty Rule 46½ the findings must contain the material facts upon which the judgment is based. In the absence of a finding, it certainly cannot be “presumed,” as appellee suggests, that the court considered the assistance to be dangerous, and based its award on such danger.

(*The Fullerton* (C. C. A. 9), 211 Fed. 833.) And the court's opinion, if both the relevant paragraphs, quoted at pages 25 and 26 of our opening brief, be considered, rather than the single paragraph quoted by appellee, leaves no doubt that the court concluded, contrary to appellee's contention, that because of "*the distance separating the two vessels*" and by "*taking proper precautions to not submit the salvor to an unusual risk*," the danger to be apprehended in a close approach to the "obstacles" which had brought the PIONEER to grief was avoided. Surely counsel does not contend that, when the court stated that it was rewarding appellee for its skill "to not submit the salvor to an unusual risk," it meant to reward the salvor for submitting to such risk.

On this question, as on the question of other assistance, appellee has sought to supplement a lack in the findings and opinion with its own contention concerning danger. But, the danger asserted by counsel as existing by reason of the NORTH QUEEN's approach to the PIONEER is based on unquestioning acceptance of the testimony of Messrs. Xitco and Berry that they approached within 300 to 400 feet of the PIONEER, in the face of the physical fact that over 200 fathoms, or over 1200 feet of line was taken out to the NORTH QUEEN. [A. 181, 171: See appellants' opening brief, p. 27.] On this fact no comment was made by appellee, nor do they comment on the obvious fact, already urged, that any potential danger was avoidable by the use of the fathometer. Counsel's contentions as to danger to rigging disregard the physical fact that the cable to the PIONEER was the weakest element used in the tow. [A. 212.] Appellee's contentions as to danger to life from collapse of the rigging, are unsupported by any evidence that there was anyone in any position to be injured by fall of the boom, which would have been the first portion of the structure to fall, if any did [A. 212]. And indeed, how can it be contended that the trial court

considered that there was danger to the rigging of the NORTH QUEEN, when the factor is not mentioned either in the court's opinion or the findings?

The award cannot thus be sustained on a basis contrary to the court's own opinion, in which, to repeat, the court, while correctly observing that appellee did "*not submit the salvor to an unusual risk,*" instead of considering lack of danger as an element which reduced the award, considered it as a phase of the question of skill, and used it to increase the award. And so there is no reference to danger in the findings, merely a reference to skill. Lack of danger is a material factor which, under the many cases cited in our opening brief, reduces the award.

Second: The trial court did not consider the ability of the PIONEER to free herself.

Appellee has, with commendable frankness, avoided any contention that the ability of the PIONEER to free herself was considered, and has confined himself to the argument that no such ability existed, or that it was speculative and should not be considered. Three points are made by appellee on this score: *first*, that the rise in tide to be anticipated was not enough; *second*, that the PIONEER would probably be holed by the rocks before she floated off; and, *third*, that she had tried once and failed.

The last of these arguments may be disposed of summarily. The fact that the PIONEER tried to back off at low tide, when she first struck, and failed, is hardly proof that she could not have succeeded on a higher tide. If there is anything to this argument, it would follow that because the NORTH QUEEN tried once to pull the PIONEER off, and failed, that a later attempt on higher tide must have failed. The PIONEER was not leaking, she made port under her own power; she would have tried again.

The argument that there would not have been a sufficient rise in tide is rested on the testimony of appel-

lee's witnesses that the bow was from 3 to 5 feet out of water when the NORTH QUEEN came up. But this testimony is contrary to that of the man in the skiff of the PIONEER, who were *at the bow of the PIONEER* at the very point which was to be observed, and who stated that the waterline was then a foot to a foot and a half out of water immediately after the time the PIONEER struck. It is contrary to the testimony of Captain Varnum, appellee's expert, and our expert, Captain Scheibe, who testified that the PIONEER could not have been pulled off if the PIONEER was in such a position (see our opening brief at pp. 39-40, which is unanswered on this score). Berry's and Xitco's testimony was not believed by the court, who stated that those who operated the NORTH QUEEN "were not concerned with measurements," and that "whether it was five feet or one foot, I believe it was somewhere between those two." [A. 52.] Whatever appellee's witnesses may have thought they saw when they put their searchlight on the PIONEER from a distance of hundreds of feet out to sea, they can hardly have made any accurate observation as to the level of the waterline of the PIONEER.

The only credible testimony as to the position of the PIONEER's waterline is that of the men in the skiff who were at the waterline and who could see it, and who said that it was a foot to a foot and a half out. Theirs is the only testimony placing the PIONEER in a position which is consistent with the fact that the PIONEER was actually released. This testimony establishes that a five foot rise of tide would be more than enough to float the PIONEER (for the testimony was that the waterline is normally about 6 inches out of water) [A. 83]. In point of fact the time elapsed between the stranding and the floating of the PIONEER, a period of about an hour and a half, is about a quarter of the time for the full time foot rise, and a rise of a foot or so is almost exactly the

amount needed to float the PIONEER. As Captain Scheibe testified, the tide was the principal factor in freeing the PIONEER [A. 207]. It is impossible that much longer could have been required to enable the PIONEER to back off.

The same facts defeat the contention that great damage would have been done to the PIONEER had she waited until floated by the tide. For the expert testimony relied on by appellee in this connection was all founded on the assumption that a substantial further period of time would have to elapse before the PIONEER could float enough to pull off under her own power, which assumption is, as we have seen, contrary to the evidence. Barry and Xitco made this assumption, then based their testimony of course on their prior errors with respect to the position of the PIONEER. Barry in fact testified that a 12 or 15 foot tide would be needed [A. 142]. Varnum was required to assume the truth of the same erroneous information [A. 154]. These errors were the basis of the testimony that a rise in tide would not free the PIONEER but, by increasing its motion would increase damage on the rocks. Mr. Lande's cross-examination of Captain Scheibe, on which he places so much weight (see appellee's brief at p. 26) relates to the damage to be expected "before she came free at high tide," and to damage from a future rise in tide giving buoyancy without freeing, without regard to the fact that the significant rise in tide was not to come in the future, but had occurred in the past when the PIONEER came off, and without regard for the fact that there was no apparent reason why the PIONEER should not float off long before high tide. There were other errors in the assumptions of appellee's witnesses, which are pointed out in our opening brief. This whole mass of testimony ceases to have significance in view of these erroneous assumptions. The PIONEER did not go aground with her bow 3 to 5 feet out of water, as these witnesses were required to assume. It was not nec-

essary to wait for high tide, as Mr. Lande required Captain Varnum and Captain Scheibe to assume, for the PIONEER to float. A ten or twelve foot tide was not required to float the PIONEER,—a one to two foot tide did the job very well. For, as Captain Scheibe testified [A. 207], before the PIONEER could be freed with the equipment of the NORTH QUEEN and the line of the PIONEER, it was essential that the PIONEER be partly freed by the tide.

Some emphasis is placed by appellee on the damages suffered by the PIONEER while on the rocks. But, as Captain Scheibe testified [A. 30], this damage could have been done when she struck, and, since she struck at eight knots, obviously a great deal of damage must have been done then. The damage was largely to the keel, on which she struck. All witnesses agreed that there was only a very gentle swell, rocking the PIONEER slightly—a matter of five to ten degrees. Such gentle rocking could of course crush the strainers, to which appellee has referred, which are on the bottom, six feet from the keel, and damage to them is certainly no indication of projecting rocks which might puncture the hull. The master of the PIONEER testified that she was not pounding. (Indeed, if the PIONEER had been pounding her planking on rock for an hour and a half, she would hardly have been free from leaks.) The argument that rocks which had not damaged the planking of the PIONEER theretofore would appear and puncture the planking stretches probability altogether too far.

The weather was good: the tide had reached the point when the PIONEER was nearly ready to come off and so, with a rusty $\frac{5}{8}$ -inch steel cable, she could be pulled off. Under these circumstances, the probability that she would shortly free herself should have been considered.

Ulster S. S. Co. v. Cape Fear Transportation Co.,
94 Fed. 214.

This same set of errors dominated the third factor here considered, which is,

Third: That skill was given excessive emphasis.

We have observed, in our opening brief, that the trial court, both in the findings and in its opinion, substitutes for consideration, in place of the question whether this salvage is of a high degree of merit, the question whether it rises to the dignity of a high degree of skill. Skill is not the equivalent of merit, for, in the determination of merit, many factors are involved—including danger, time and expense, and the whole catalogue of relevant factors. As is held in *The Naiwa* (C. C. A. 4th), 1924 A. M. C. 1432, skill does not alone give rise to a high award.

Appellee distinguishes *The Naiwa* on the ground that, in that case, the skill was that of a salvage firm. That does not make the cases distinguishable. The skill of salvage firms, which invest large sums of money, and train and maintain large crews exclusively for salvage purposes, deserves and receives special reward (*The Kia Ora* (C. C. A. 4th), 252 Fed. 507). Appellee himself claims special reward because of Berry's experience. But the purpose of salvage awards is to encourage like services on future occasions. (*De Aldamis v. Th. Skogland & Sons* (C. C. A. 5th), 17 F. (2d) 873.) This policy would hardly be served if a high reward is given for the skill alone of an experienced salvage man accidentally aboard a fishboat, as against a low reward for skill alone on the part of salvage personnel on specialized salvage equipment maintained at great expense. Hence, under *The Naiwa*, *supra*, even if Berry's special skill would properly be decided to be the sole cause of the salvation

of the PIONEER. In the absence of hardship or danger, appellee's service for so brief a time would carry no high reward.

But, in deciding the case, the trial court omitted deciding the one fact that would have enabled it to decide how important Berry's services were. For, as we have seen, the trial court did not decide how far the PIONEER was out of water when she struck. As to this, to repeat our earlier quotation, the court said simply,

“But whether it was five feet or one foot, I believe it was somewhere between these two.” [A. 52.]

Without deciding this question, it was impossible for it to do more than guess at the relative significance of appellee's maneuvers, as against the significance of the tide. Had the evidence of the PIONEER's position been considered, and this point decided, for the reasons stated before, there could have been no conclusion save the PIONEER struck with her waterline a foot or so out of water. The conclusion that the rise in tide, not Berry's skill, was the cause of the difference between the success of the first and the second attempt to free the PIONEER, would inevitably have followed. Thus, the dismissal by the trial court, as merely speculative, of the real evidence of the PIONEER's ability to free herself, resulted not merely in an over-emphasis on skill, but on a total inability to do more than speculate on what skill had to do with freeing the PIONEER.

Fourth: The trial court erred in failing to consider the lack of expense to the appellee.

On this aspect of the case, we are content to rest on the argument made in our opening brief.

IV.

The Award Is Palpably Excessive: The Fact That Vessel Values Are Today Inflated Does Not Mean That Salvage Awards Are Larger in Proportion to Values.

In our opening brief we cited many cases involving more or less comparable services to stranded vessels. We discussed their facts fully and compared the awards with those in the present case. Those cases show that \$12,000 is far too much money for less than two hours fair weather pulling against a stranded vessel of the PIONEER's value. In the cases closest as to value and service, the awards were reduced to well below that here made, although periods of service were far greater. We think those cases stand on their own feet, and we are not going to extend this brief by discussing specifically each of appellee's attempted distinctions thereof. Counsel has, however, a few stock grounds of distinction which we will briefly mention.

First: Counsel objects to many of those cases on the ground that many of them involve tugs, whose primary business is towing. But, over counsel's strenuous objections, we proved by Captain Joncich's testimony that towage of one fishboat by another is common [A. 172, 173]. We have submitted the cases in our brief, not because they are tugboat cases, or steamboat cases, or sailboat cases, but because they are *stranding* cases, or other classes of comparable service, and because they involve either statements of principle of significance here, or because they show what sort of an award requires reduction. Some involve tugs, others such as *De Aldamiz v. Th. Skogland & Sons* (C. C. A. 5th), 17 F. (2d) 873; *Societa Commerciale Italiana Di Navigazione v. Maru Nav. Co.* (C. C. A. 4th), 280 Fed. 334, do not. Some involve specially equipped salvage tugs which, as pointed out heretofore,

are apparently entitled to special reward. Apart from this factor, which certainly does not aid appellee, no distinction of principle between tugs and other vessels is made in the cases. A simple towing operation is not, of course, as many of them point out, unusual for a tug; but neither, for that matter, from the testimony is it unusual for a fishboat. There might be something to such a distinction, had the decision in this case been rested on appellee's contentions as to danger to his vessel from pulling. But such was not the case and, on the evidence, as we have seen, there is not much to the contention. A fishboat, as such, is certainly not entitled to a higher reward than a tug for salvage services.

Second: Appellee attempts to distinguish many of the cases we have cited on the theory that in those cases there was no special element of danger, skill or seamanship. The cases do not actually speak of absence of skill or seamanship, but rather of absence of danger or heroism. The presence of skill does not, as we have seen, justify a high award, and the exceptional elements justifying a high award are peril, unusual expense, gallantry or heroism. (*The Naiwa*, *supra*; and see the various quotations on pages 29-35 of our opening brief.) For present purposes this probably does not greatly matter. For what was done in those cases is pretty much what appellee did in this case, and, to the extent that skill, heroism, and danger were lacking in those cases, it is lacking here. The only difference is that all of those cases involved days of labor instead of less than two hours as in this case.

Third: It is suggested that the dollar is not worth what it used to be, hence that where saving a \$100,000 vessel once carried a \$4,200 award (in *The Hesper*, see appellee's brief at page 17), a \$12,000 award is now proper for a service to a vessel of like value. Presumably in 1960 a \$20,000 award will be proper for salvaging

a \$100,000 vessel and some day a \$100,000 award. We should have thought the fallacy in that argument was apparent enough to preclude its presentation. Surely it must be clear that the ordinary standards applied in determining a salvage award vitiate any such notion. One of the principal factors in determining a salvage award is the *value* of the salvaged craft. The same inflation that decreases the value of dollars in which the salvor is paid *increases the value of the boat salvaged and the salvaging craft*. To take a simple example, it is quite doubtful that the purse seiners involved in this case would have been worth half the amount involved in this case before the second world war. In the days of *The Hesper*, the PIONEER would hardly have been worth a tenth of the amount of its present value. Appellee apparently asks that he be given an amount equal in real value to the value of the award in *The Hesper* case, which was made in 1883 dollars. But, if this discount scale is to be applied to the current value of the currency, both parties must have the benefit thereof. Is appellee willing to reduce the value of the PIONEER to ten or twenty thousand 1883 dollars?

In point of fact, due to the development of modern aids to navigation, of the radio, and because of the omnipresence of power vessels, the awards have tended to decrease as the years have gone by. (*The Manchester Brigade* (D. C. Va.), 276 Fed. 410; *The Eastern Glen*, 11 F. Supp. 995.) In the present case, we have another such aid, the fathometer, operating to reduce the risk. In *The Kia Ora*, 252 Fed. 507, where the factor of inflation was mentioned, the service reduced involved the maintenance of a complete wrecking service, and the increased cost thereof may have been affected by inflation. Despite the case's mention of this factor, the award was closely comparable to other awards for like services made in cases cited. If *The Kia Ora* be treated as stating any general prin-

ciple favoring the consideration of inflation beyond its effects on the values involved, we respectfully submit that it cannot be followed. There can be no rule that as the years go by, and the value of the dollar declines, and the value of ships therefore goes up, salvage awards get larger and larger in proportion to the value of the ship salvaged. There would soon be naught for the owner. The salvor gets the benefit of inflation once in the increased value of the salvaged craft. He is not entitled to get it twice.

Finally, appellee mentions eight cases which, it is suggested, may be more helpful than those we have cited. Their facts are not stated, nor is it stated in what respect they are deemed comparable.

In the first, *Dalsell v. Central Union Stockyards, et al.*, (D. C., S. D. N. Y.), 1935 A. M. C. 1048, 12 F. Supp. 179, the salving tug secured itself alongside a sinking barge so that, if the barge sank, the tug would have been capsized. We have no comparable danger incurred by appellee, and the services are not similar in nature. And the award was much smaller in that case.

The next case, *The Commonwealth*, 1932 A. M. C. 199 (W. D. Wash.), is unreported officially, or unofficially, but A. M. C. prints an abstract indicating that, for three days' services to a stranded powerless fishing boat, valued at \$12,000, a total of \$1,500 was awarded. The values in our case are slightly less than ten times the values in that case. Counsel apparently assumes that this demonstrates his right to an award of slightly less than ten times the award made in that case. But, of course, the awards made do not rise arithmetically with the increase in the values; and, moreover, that three day service can hardly be compared to two hours' services to a vessel capable of making port under her own power.

Rustad v. Wuori (The Melody), 157 F. (2d) 448, is a decision of this Circuit Court of Appeals. We have al-

ready referred to that case on page 59 of our opening brief. That case involved an award of \$4,300, using a salvaged value of \$19,500, for services over a period extending over two days to a sinking derelict. (Services to a derelict are always valued at a higher basis than normal salvage services.) A loss to the salvor in the amount of \$3,000 to \$5,000 through loss of fish was proved because of damage to tackle in the assistance. It was thus impossible in that case, due to the low values, adequately to compensate the salvor at all. Heroism was involved in that one of the seamen boarded the wreck and fixed the towline below water while standing on the MELODY's submerged deck with water to his shoulders. Despite the difference in values, we do not see how the present case could justify an award of three times the amount paid in the MELODY, for none of the special circumstances of loss, danger, or time expended, present in the MELODY, are present in this case.

The case of *The Wahkeena* (C. C. A. 9th), 56 F. (2d) 836, and the case of *De Aldamis v. Th. Skogland & Sons*, 17 F. (2d) 873, have already been fully discussed by us in our opening brief at pages 17 and 19. In both *The Kia Ora*, 252 Fed. 507, 511, and *The Craster Hall*, 213 Fed. 436, the values involved and the expenditure of time and energy far exceeded those with which we are concerned.

Last, but not least, appellee cites *The Cleveland*, 1933 A. M. C. 1557 (D. C., E. D. N. Y.), of which also only an abstract is reported. In this case the CLEVELANDER, valued at \$135,159—\$33,000 more than the PIONEER, was pulled off a strand by two vessels worth \$90,000. The service involved "some difficulty" and were rendered on a rising tide. After the CLEVELANDER was pulled off, she had to be towed into port. Four hours' services were involved. \$5,000 was awarded. We are quite willing to agree with appellee as to the comparability of that case

with this case. It is altogether comparable, and the award made in it is not greatly excessive. We do not see how it helps appellee. It would indicate that something between \$2,500 and \$3,500 would be adequate in this case.

Conclusion.

There is nothing in this case to justify an award of \$12,000 for about two hours' services in calm and clear weather. Appellee has cited no authority sanctioning such an award. Those we have discussed show that the award is grossly excessive and should be reduced. We believe that the reduction should be on the scale indicated in our opening brief.

Respectfully submitted,

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No. 11881

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

MARLBOROUGH CORPORATION,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal From the District Court of the United States
for the Southern District of California
Central Division

FILED

JUN 18 1948

PAUL R. O'BRIEN,
CLERK.

No. 11881

IN THE
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*Page number appearing at foot of Certified Transcript.

In the District Court of the United States in and for the
Southern District of California

Central Division

Civil No. 3727-H

MARLBOROUGH CORPORATION

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT FOR RECOVERY OF FEDERAL
INCOME TAXES ILLEGALLY ASSESSED
AND COLLECTED

Comes now the plaintiff, and for cause of action against
defendant alleges:

I.

That plaintiff is, and at all times herein mentioned was,
a corporation organized and existing under and by virtue
of the laws of the State of California, duly qualified to
transact business therein and having its principal place
of business and office at 735 Roosevelt Building, Los
Angeles, California, and within the Sixth Internal Revenue
Collection District of said State of California.

II.

JURISDICTION

The taxes sought to be recovered in this proceeding
were collected by Nat Rogan, Collector of Internal Rev-
enue, for the Sixth District of California, acting for and

on behalf of defendant, and whereas Nat Rogan is [2] no longer in office, jurisdiction of this action lies in this District Court under the provisions of Section 3772 of 1122(c) of the Revenue Act of 1926, and Judicial Code, Section 24 (Title 28, USCA Section 41).

III.

On or before the time required by law, plaintiff filed its income tax return on form 1120 for its taxable year ended August 31, 1939, showing a net income of \$37,337.55, and concurrently paid to the Collector of Internal Revenue for the Sixth District of California the sum of \$6,279.36 representing its income tax liability for the aforesaid taxable year.

IV.

(a) Thereafter, and by letter dated July 7, 1942, (Symbols LA:IT:90D:PB), the Commissioner of Internal Revenue asserted a deficiency in Federal income taxes against the plaintiff for the taxable year ended August 31, 1939, in the amount of \$3,389.55 plus interest for the asserted late payment thereof.

(b) The entire amount of the deficiency in taxes claimed to be due for the fiscal year ended August 31, 1939, was based upon the assertion of liability for the surtaxes under Section 102 of the Revenue Act of 1938.

(c) Thereafter and on or about July 31, 1942, plaintiff paid to Nat Rogan, Collector of Internal Revenue at Los Angeles, on account of said asserted deficiency in income

taxes, the amount of \$3,942.46 which was applied as follows:

On the alleged deficiency for the year ended August 31, 1939, under Section 102 of the Revenue Act of 1938	\$3,389.55
Interest on said alleged deficiency	551.24
Overpayment for year ended August 31, 1939	1.67
	<hr/>
Total taxes and interest paid	\$3,942.46
	<hr/> <hr/>

V.

The Federal income tax deficiency paid by and collected from the plaintiff by the Collector of Internal Revenue, Nat Rogan, for the taxable year ended August 31, 1939, was illegally assessed and collected from the [3] plaintiff and was in excess of the amount legally due and owing to the United States from the plaintiff by reason of the following facts:

(a) Plaintiff was neither formed nor availed of, either during the taxable year ended August 31, 1939, or any other taxable year, for the purpose of preventing the imposition of surtaxes upon its shareholders as provided by Section 102 of the Revenue Act of 1938 and/or Section 102 of the Internal Revenue Code.

(b) Plaintiff did not, either during the taxable year ended August 31, 1939, or during any other taxable year accumulate, or permit its earnings and/or profits to accumulate in excess of the reasonable needs of its business.

(c) That any and/or all of plaintiff's earnings and/or profits which have been accumulated were necessary to the conduct and future needs of plaintiff's business, and none of its earnings and/or profits were accumulated or withheld from the payment of dividends for the purpose of

avoiding the imposition of surtaxes upon plaintiff's shareholders. The purposes for which the earnings and/or profits of plaintiff's business were accumulated were, among others, as follows:

(1) A large part of the useful lives of the assets used in plaintiff's business, particularly its buildings, was exhausted; many of such assets were in a deteriorated condition, outmoded and insufficient in capacity and facilities for the proper conduct of plaintiff's business, and required replacement as soon as financial and building conditions warranted.

(2) The principal working assets of a school business consist of buildings and ground facilities, the acquisition and replacement of which require the accumulation of funds and reserves over long periods of time and the use of accumulated earnings and profits to retire indebtedness incurred therefor.

(3) Because of changes in the California building codes and laws, replacement of certain of plaintiff's school buildings required the expenditure of almost double the amounts originally expended in erecting such buildings. Even with the accumulations of resources available during the years in question, plaintiff would be required to borrow large sums in order to make such replacements. The distribution of such resources as dividends would have not only increased the necessary borrowing beyond the limits of financial safety but, [4] because of the inadequate security afforded by private school buildings would have put plaintiff in a position where it could not obtain the funds required for such replacements at all.

(4) During the years in question it was definitely known that the lease under which the business had formerly been operated by a lessee using her own working

capital was to be terminated within a year. Plaintiff therefore undertook to accumulate working capital sufficient to operate the business on its own behalf.

(5) Changing conditions and shifts in the population of Los Angeles made it advantageous and a business necessity to move rather than rebuild the school at its then location. The funds required to consummate such a change substantially exceeded the amounts which plaintiff could expect to borrow plus accumulations on hand during the years in question, and required additional accumulations of earnings and profits during subsequent years.

VI.

On or about August 7, 1943, and within two years of the date of payment of the Federal income tax deficiency, erroneously and illegally collected as aforesaid, plaintiff filed its claim for refund on Form 843 for the taxable years ended August 31, 1939, a copy of which is attached hereto and marked Exhibit "1." Said claim set forth, under oath, the grounds for refund hereinabove relied upon and facts sufficient to apprise the defendant and Commissioner of Internal Revenue of the exact basis of the claim. On November 5, 1943, the Commissioner of Internal Revenue mailed, by registered mail, his notice of disallowance of said claim, excepting, however, that the Commissioner determined an overassessment of \$41.98 for the taxable year ended August 31, 1939, due to the exclusion from plaintiff's gross income of the amount of certain nontaxable bond interest erroneously reported by plaintiff in its return for said year.

VII.

By reason of the above facts, defendant erroneously and illegally collected \$3,389.55 in income taxes from plaintiff,

together with \$552.91 interest thereon for the asserted late payment of such tax, all of which [5] defendant has refused and still does refuse to repay or refund to plaintiff notwithstanding plaintiff has made demands and claims therefor according to law.

For a second and separate cause of action against defendant, plaintiff further alleges:

I.

The allegations contained in paragraphs I and II of plaintiff's first cause of action are hereby fully and completely incorporated by reference in this cause of action.

II.

On or before the time required by law, plaintiff filed its income tax return on form 1120 for its taxable year ended August 31, 1940, showing a net income of \$21,-870.32 and concurrently paid to the Collector of Internal Revenue for the Sixth District of California the sum of \$2,535.91 representing its income tax liability for the said taxable year.

III.

(a) Thereafter and by letter dated July 7, 1942 (Symbols LA:IT:90D:PB), the Commissioner of Internal Revenue asserted a deficiency in Federal income taxes against plaintiff for the taxable year ended August 31, 1940, as follows:

Income tax under Section 13, Internal	
Revenue Code	\$ 924.46
Surtax under Section 102, Internal Rev-	
enue Code	5,112.03
	<hr/>
Total deficiency asserted	\$6,036.49
	<hr/> <hr/>

(b) The deficiency in taxes asserted for the fiscal year ended August 31, 1940, was based upon:

(1) The disallowance of depreciation deducted in plaintiff's return for said year in the amount of \$4,538.18 resulting in an increase in the income tax liability under Section 13 of the Internal Revenue Code in the amount of \$924.46;

(2) The assertion of liability for surtaxes under Section 102 of the Internal Revenue Code in the amount of \$5,112.03 resulting in a total additional tax deficiency asserted against the plaintiff for said taxable year in the amount of \$6,036.49. [6]

(c) Thereafter and on or about July 31, 1942, plaintiff paid to Nat Rogan, Collector of Internal Revenue at Los Angeles, on account of said asserted deficiency in taxes, the amount of \$6,658.99, which was applied as follows:

On the alleged deficiency for the year ended August 31, 1940, under Section 13, Internal Revenue Code	\$ 924.46
On the alleged deficiency for the year ended August 31, 1940, under Section 102, Internal Revenue Code	5,112.03
Interest on said alleged deficiencies	619.52
Overpayment for the year ended August 31, 1941	2.98
	<hr/>
Total taxes and interest paid	\$6,658.99
	<hr/> <hr/>

IV.

The Federal income tax deficiencies paid by and collected from the plaintiff by the Collector of Internal

Revenue, Nat Rogan, for the taxable year ended August 31, 1940, were illegally assessed and collected from the plaintiff, and were in excess of the amount legally due and owing to the United States from the plaintiff by reason of the following facts:

(a) Plaintiff was neither formed nor availed of, either during the taxable year ended August 31, 1940, or any other taxable year, for the purpose of preventing the imposition of surtaxes upon its shareholders as provided by Section 102 of the Revenue Act of 1938 and/or Section 102 of the Internal Revenue Code.

(b) Plaintiff did not, either during the taxable year ended August 31, 1940, or during any other taxable year, accumulate or permit its earnings and/or profits to accumulate in excess of the reasonable needs of its business.

(c) That any and/or all of plaintiff's earnings and/or profits which may have been accumulated were necessary to the conduct and future needs of plaintiff's business, and that none of its earnings and/or profits were accumulated or withheld from the payment of dividends for the purpose of avoiding the imposition of surtaxes upon plaintiff's shareholders. The purposes for which [7] the earnings and/or profits of plaintiff's business were accumulated were, among others, as follows:

(1) A large part of the useful lives of the assets used in plaintiff's business, particularly its buildings, was exhausted; many of such assets were in a deteriorated condition, outmoded and insufficient in capacity and facilities for the proper conduct of plaintiff's business, and required replacement as soon as financial and building conditions warranted.

(2) The principal working assets of a school business consist of buildings and ground facilities, the acquisition and replacement of which require the accumulation of funds and reserves over long periods of time and the use of accumulated earnings and profits to retire indebtedness incurred therefor.

(3) Because of changes in the California building codes and laws, replacement of certain of plaintiff's school buildings required the expenditure of almost double the amounts originally expended in erecting such buildings. Even with the accumulations of resources available during the years in question, plaintiff would be required to borrow large sums in order to make such replacements. The distribution of such resources as dividends would have not only increased the necessary borrowing beyond the limits of financial safety but, because of the inadequate security afforded by private school buildings would have put plaintiff in a position where it could not obtain the funds required for such replacements at all.

(4) During the years in question it was definitely known that the lease under which the business had formerly been operated by a lessee using her own working capital was to be terminated within a year. Plaintiff therefore undertook to accumulate working capital sufficient to operate the business on its own behalf.

(5) Changing conditions and shifts in the population of Los Angeles made it advantageous and a business necessity to move rather than rebuild the school at its then location. The funds required to consummate such a

change substantially exceeded the amounts which plaintiff could expect to borrow plus accumulations on hand during the years in question, and required additional accumulations of earnings and profits during subsequent years. [8]

(d) In disallowing the amount of \$4,538.18 as a deduction for depreciation and/or obsolescence sustained by plaintiff for the fiscal year ended August 31, 1940, the Commissioner of Internal Revenue computed his allowance for depreciation upon plaintiff's auditorium building, upon the basis of a useful life of forty (40) years, whereas such building had and will have a useful life in plaintiff's business of not to exceed ten (10) years from and after the close of the taxable year ended August 31, 1940. In assessing and collecting the taxes in question upon the basis of the useful life determined by the Commissioner of Internal Revenue, plaintiff was erroneously and illegally denied the reasonable allowance for exhaustion, wear and tear and obsolescence allowed by law.

V.

On or about August 7, 1943, and within two years of the date of payment of the Federal income tax deficiencies, erroneously and illegally collected as aforesaid, plaintiff filed its claim for refund on form 843 for the taxable year ended August 31, 1940, a copy of which is attached hereto and marked Exhibit "2." Said claim set forth, under oath, the grounds for refund hereinabove relied upon and facts sufficient to apprise the defendant and Commissioner of Internal Revenue of the exact basis

of the claim. On November 5, 1943, the Commissioner of Internal Revenue mailed, by registered mail, his notice of disallowance of said claim, excepting, however, that the Commissioner of Internal Revenue determined an over-assessment of \$85.75 for the taxable year ended August 31, 1940, due to the exclusion from plaintiff's gross income of the amount of certain nontaxable bond interest erroneously reported by plaintiff in its return for said year.

VI.

By reason of the above facts, defendant erroneously and illegally collected \$6,036.49 in income taxes from plaintiff together with \$622.50 interest thereon for an asserted late payment of such tax, all of which defendant has refused and still does refuse to repay or refund to plaintiff, notwithstanding plaintiff has made demands and claims therefor according to law. [9]

Wherefore, plaintiff prays this Honorable Court for judgment that the plaintiff has overpaid its liability for income taxes and interest for the taxable year ended August 31, 1939, in the amount of \$3,942.46 and for the taxable year ended August 31, 1940, in the amount of \$6,658.99; that plaintiff have and recover from defendant the total amount of \$10,601.45 plus interest thereon from the date of overpayment as provided by law; and for such further relief as may be meet and just.

THOMAS R. DEMPSEY

ARTHUR H. DEIBERT

WILLIAM L. KUMLER

Attorneys for Plaintiff [10]

[Verified.] [11]

* * * * *

[Endorsed]: Filed Jun. 28, 1944. [53]

[Title of District Court and Cause]

ANSWER

Comes now the defendant in the above-entitled action, and in answer to plaintiff's complaint admits, denies and alleges:

FIRST CAUSE OF ACTION

In answer to the first cause of action of plaintiff's complaint, defendant:

I.

Admits the allegations contained in Paragraph I thereof;

II.

Admits the allegations contained in Paragraph II thereof;

III.

Admits the allegations contained in Paragraph III thereof;

IV.

Admits the allegations contained in Paragraph IV thereof;

V.

Denies the allegations contained in Paragraph V thereof; [54]

VI.

Admits the allegations contained in Paragraph VI thereof, except that defendant denies that the income tax deficiency there referred to was erroneously and/or illegally collected.

VII.

Denies the allegations contained in Paragraph VII thereof, except that defendant admits that the alleged not [E.N.F.] overpayment referred to has \wedge been repaid or refunded to the plaintiff.

SECOND CAUSE OF ACTION

In answer to the second cause of action of plaintiff's complaint, defendant:

I.

Admits the allegations contained in Paragraph I thereof;

II.

Admits the allegations contained in Paragraph II thereof;

III.

Admits the allegations contained in Paragraph III thereof;

IV.

Denies the allegations contained in Paragraph IV thereof.

V.

Admits the allegations contained in Paragraph V thereof, except that defendant denies that the alleged overpayment therein referred to was erroneously and/or illegally collected.

VI.

Denies the allegations contained in Paragraph VI thereof, except that defendant admits that the claimed overpayment referred to has not been repaid or refunded to the plaintiff.

Wherefore, having fully answered, defendant prays that it be hence dismissed with its costs in this behalf expended.

CHARLES H. CARR

United States Attorney

E. H. MITCHELL and

GEORGE M. BRYANT

Asst. United States Attys.

EUGENE HARPOLE

Spec. Atty., Bur. Int. Rev.

By E. H. Mitchell

Attorneys for Defendant [55]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Oct. 30, 1944. [56]

[Title of District Court and Cause]

STIPULATION AFTER PRE-TRIAL
CONFERENCE

The above-entitled proceeding having come on for pre-trial conference at 2:00 p. m. June 27, 1946, and counsel for the respective parties having stated their respective positions with respect to the issues raised in the cause, and the Court having decided to view the subject premises at 5029 West Third Street, Los Angeles, California, and the conference having adjourned thereto for the purpose of acquainting the Court with the subject premises but not for the purpose of taking testimony with respect thereto; it is Stipulated by counsel for the respective parties that in viewing the subject premises the Court inspected the following:

(1) The principal's office, including furniture and furnishings therein;

(2) The financial office, including lockers built therein;

(3) The entrance hall, including furnishings and furniture therein;

(4) The vice-principal's office;

(5) The living room, including the furnishings and furniture therein; [57]

(6) The main office, including the furnishings therein;

(7) The academic vice-principal's office, including the furniture and furnishings therein;

(8) The corridors on the first floor of the west wing of the main building;

(9) The large library on the first floor of the main building, including the shelves and stacks;

(10) The students' office, including the counter and furniture therein;

(11) Room B, classroom;

(12) The senior high art department, including the places where partitions had been removed and Celotex wall covering installed;

(13) The junior high art room, including the plumbing, lockers, cupboards and linoleum;

(14) The chemistry laboratory, including the equipment therein;

(15) A corridor on the second floor of the main building;

(16) A classroom on the second floor of the main building;

(17) The biology laboratory, including the lockers therein;

(18) Classroom M, junior high science room, including lighting fixtures therein;

(19) Various classrooms on the second floor of the west wing of the main building, including the furnishings and fixtures therein;

(20) Room 5, formerly constituting two rooms, including lockers and shelves built in;

(21) The reading room, formerly constituting two rooms, also the linoleum therein;

(22) Rooms 3 and 4;

(23) The lavatory on the second floor of the main building, formerly consisting of three small bathrooms;

(24) The corridor in the west wing of the second floor of the main building;

(25) The junior high library together with an open-air deck outside, and the condition of the exterior paint at this location; [58]

(26) Returning through the junior high library, the Court proceeding to Room 6, which had formerly been a bedroom;

(27) Room 7, which had formerly been two bedrooms;

(28) Room 8, which had formerly been three bedrooms, a bath and closet;

(29) The student council room, including the furniture and furnishings therein;

(30) Mrs. Overton's room, including the furnishings therein;

(31) Room 15, which formerly had been a bedroom;

(32) The Court then proceeded to the third floor of the south wing of the main building, where a storage attic and former servants' quarters were inspected. The Court also inspected a small balcony on the south wing of the building facing northerly across the patio toward the auditorium. The Court then returned to the southeast end of the corridor on the second floor;

(33) Room 16, in the east wing, second floor, being a room for resident teachers, including the furnishings therein;

(34) Room 17, in the east wing, second floor, together with the furnishings and furniture therein;

(35) A room in the east wing, second floor, containing the type of white, painted, wood furniture which was removed when the teachers' wing was refurnished,

(36) The vocal music studio;

(37) The junior assembly room which had once been a library;

(38) The gymnasium, showing the unfurnished portions where the wall was never sealed. This was being remodeled at the time of the inspection;

(39) The showers and dressing rooms adjacent to the gymnasium;

(40) The Court then proceeded to inspect the athletic fields, including basketball courts, tennis courts, volleyball courts, and took note of the limits upon the land available for additions to such facilities;

(41) The Court then entered the auditorium building through the south entrance, and, passing northerly in the corridor on the east side of the building, inspected the classrooms on the east side of the corridor.

(42) The Court then inspected the senior high assembly room in the [59] auditorium which is used both for assembly and study, and also inspected the stage where small productions can be given.

(43) From the auditorium the Court passed to the music building, where piano instruction is given and where two rooms had been thrown together to form a supply room. In this building the Court also inspected the music department office and the choir room, taking note of the condition of the linoleum.

(44) The Court then briefly inspected Room O, used for textile work;

(45) The Court then passed through the kitchens; the main pantry, where a freezing unit had been installed in the old icebox, and inspected the servants' hall and dining room.

(46) The Court then proceeded to the two dining rooms, inspected the furnishings and took note of the condition of the carpets, which appeared particularly worn at and near entrances to the rooms.

(47) The Court then inspected the main entrance hall rugs which had been laid in 1941.

(48) The Court finally inspected the locale of the archery range.

Upon concluding the foregoing inspection, the Court adjourned the conference.

Dated: July 9, 1946.

* * * * *

[Endorsed]: Filed Jul. 10, 1946. [60]

[Title of District Court and Cause]

JOINT PRE-TRIAL MEMORANDUM

This is an action to recover a refund of a corporate surtax in the sum of \$10,601.45, tax and interest, together with interest thereon at the rate prescribed by law, which tax and interest were assessed and collected for the taxpayer's fiscal years ending August 31, 1939, and August 31, 1940.

Originally the plaintiff claimed two grounds for its desired recovery. It has abandoned the claims based upon depreciation (obsolescence). This abandonment reduces the total amount prayed for by \$924.46, together with such portion of the interest of \$619.52, paid for 1940, as may be allocated to the said \$924.46.

Plaintiff's remaining cause of action is based upon taxes and interest assessed against it by the Commissioner of Internal Revenue for its fiscal years ending August 31, 1939 and 1940, under the provisions of Section 102, Internal Revenue Code.

The case was tried in full before Judge Hollzer during his lifetime and was under submission to him at the time of his death. Stipulations of Fact have been entered into and were presented to the court at the previous trial. Considerable testimony was taken and the same has been reported and transcribed. Counsel for plaintiff and defendant are of the opinion that the court may now be fully advised of the facts in this case by the submission of the case upon the documentary evidence, the Stipulations of Fact and the transcript of the testimony of witnesses in the previous trial, together with all the pleadings and briefs which are a part of the record of this cause.

It is believed, however, that since the ultimate decision in this case must be determined by the court's opinion

as to the credibility to be accorded to the witnesses Eugene Overton and Georgia Overton, that the court may feel it advisable to examine these two witnesses. Counsel therefore are prepared now to submit the case upon the evidence and pleadings as aforesaid, with the provision that the court shall have the power and right to examine the two witnesses mentioned herein and for counsel thereafter to examine the said witnesses, but such examination to take place only in the event that the court decides to re-examine said witnesses.

STATEMENT OF THE FACTS

During the taxable years in question the plaintiff was engaged in the business of holding and renting school property to a school known as Marlborough School for Girls, operated by Ada Blake. The property is located at 5029 West Third Street, between Van Ness and Rossmore Streets, in the City of Los Angeles, State of California, and has a frontage of 150 feet on Third Street and 700 feet on Rossmore. The questions presented to the court are: Whether the corporation was availed of for the purpose of avoiding the imposition of surtax upon its stockholders; and, whether the accumulations set forth in the Stipulations of Fact were unreasonable and in excess of the needs of plaintiff's business.

The pertinent statutes and regulations and the case law involved have been presented in full in counsels' preliminary memoranda and the briefs filed in this cause.

Respectfully submitted,

* * * * *

A True Copy. Attest, etc., Mar. 24, 1948. Edmund L. Smith, Clerk U. S. District Court, Southern District of California; by Theodore Hocke, Deputy. [Seal]

[Endorsed]: Filed Jun. 27, 1946.

[Title of District Court and Cause]

PRE-TRIAL ORDER

It appearing that the within cause was fully before Judge Hollzer during his lifetime; that counsel for defendant and plaintiff are both of the opinion that the Court may be fully advised of the facts in the case by the submission of the case upon the documentary evidence, the Stipulations of Fact, and the transcript of the testimony of witnesses in the previous trial, together with all the pleadings and briefs which are a part of the record of this cause; that counsel for defendant and plaintiff are both agreeable to such a submission of the case; and that the Court has viewed the property involved in company with respective counsel;

It Is Ordered that this cause be taken under submission on the merits by the Court on or after July 26, 1946, upon the same files, record, evidence, transcript and briefs as heretofore submitted to Judge Hollzer, subject to the taking of any additional evidence or proceedings which the Court may desire and indicate by further order.

Dated this 2nd day of October, 1946.

JACOB WEINBERGER

Judge

Approved as to form: Dempsey, Thayer, Deibert & Kumler, by W. P. Thayer, Attorneys for Plaintiff. James M. Carter, United States Attorney, E. H. Mitchell and George M. Bryant, Assistant U. S. Attorneys, Eugene Harpole, Special Attorney, Bureau of Internal Revenue, by George M. Bryant, Attorneys for Defendant.

A True Copy. Attest, etc., Mar. 24, 1948. Edmund L. Smith, Clerk U. S. District Court, Southern District of California; by Theodore Hocke, Deputy. [Seal]

[Endorsed]: Filed Oct. 5, 1946.

[Title of District Court and Cause]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial on the 25th, 26th and 27th days of September, 1945 and on the 16th day of December, 1946, before the Court, sitting without a jury; plaintiff appearing by its attorneys, Dempsey, Thayer, Deibert & Kumler, and the defendant appearing by James M. Carter, United States Attorney for the Southern District of California, E. H. Mitchell and George M. Bryant, Assistant United States Attorneys for said District; and evidence both oral and documentary having been received and the Court having fully considered the same, hereby makes the following special Findings of Fact:

FINDINGS OF FACT

I.

Plaintiff is, and at all times pertinent hereto was, a corporation organized and existing under and by virtue of the laws of the State of California, duly qualified to transact business in said State and having its principal place of business at Room 735 Roosevelt Building, Los Angeles, California, within the [61] Sixth Internal Revenue Collection District of the State of California.

II.

The taxes sought to be recovered in this proceeding were collected by Nat Rogan, Collector of Internal Revenue for the Sixth District of California on behalf of the United States of America. The said Nat Rogan is no longer in office.

III.

Plaintiff filed its income tax return on or before the due date for its taxable year ending August 31, 1939 showing a net income of \$37,337.55, and paid therewith collector [JW] to the said ^ Nat Rogan the sum of \$6,279.36 as its income tax liability based upon the net income shown in said return.

IV.

On July 7, 1942, the Commissioner of Internal Revenue asserted a deficiency in federal income taxes against plaintiff for its taxable year ending August 31, 1939 in the sum of \$3,389.55 together with interest thereon. That said deficiency was based upon a liability for surtaxes under Section 102 of the Revenue Act of 1938. Thereafter on about the 31st day of July, 1942, plaintiff paid said collector [JW] to ^ Nat Rogan on account of said deficiency the amount of \$3,942.46 which was applied as follows:

On the alleged deficiency for the year ended August 31, 1939, under Section 102 of the Revenue Act of 1938	\$3,389.55
Interest on said alleged deficiency	551.24
Overpayment for year ended August 31, 1939	1.67
	<hr/>
Total taxes and interest paid	\$3,942.46
	<hr/> <hr/>

V.

The plaintiff duly filed its income tax return for its taxable year ending August 31, 1940 showing a net income of \$21,870.32 and paid with said return the sum of \$2,535.91 as its income tax liability for the said taxable year. Thereafter on July 7, 1942, the Commissioner of Internal Revenue asserted a deficiency in federal income taxes against plaintiff for the taxable [62] year ending August 31, 1940 as follows:

Income tax under Section 13, Internal Revenue Code	\$ 924.46
Surtax under Section 102, Internal Revenue Code	5,112.03
	<hr/>
Total deficiency asserted	\$6,036.49

The deficiency in taxes asserted for the fiscal year ended August 31, 1940 was based upon, first, the disallowance of depreciation deducted in plaintiff's return for said year in the amount of \$4,538.18 resulting in an increase in the income tax liability of plaintiff under Section 13 of the Internal Revenue Code in the amount of \$924.46, and second, the assertion of liability for surtaxes under Section 102 of the Internal Revenue Code in the amount of \$5,112.03 resulting in a total additional tax deficiency asserted against plaintiff for said taxable year in the amount of \$6,036.49.

VI.

Thereafter and on or about July 31, 1942, plaintiff paid to Nat Rogan, Collector of Internal Revenue at Los An-

geles, on account of said asserted deficiency in taxes, the amount of \$6,658.99, which was applied as follows:

On the alleged deficiency for the year ended August 31, 1940, under Section 13, Internal Revenue Code	\$ 924.46
On the alleged deficiency for the year ended August 31, 1940, under Section 102, Internal Revenue Code	5,112.03
Interest on said alleged deficiencies	619.52
Overpayment for the year ended August 31, 1941	2.98
	<hr/>
Total taxes and interest paid	\$6,658.99
	=====

VII.

On or about August 7, 1943, and within two years of the date of the payment of the federal income tax deficiency asserted by the Commissioner of Internal Revenue as aforesaid for the taxable years of plaintiff ending August 31, 1939 and August 31, 1940, plaintiff filed its claims for refund of the taxes and interest paid as aforesaid. Said claims set forth the grounds [63] for refund relied upon by plaintiff and set forth sufficient facts to apprise the defendant and Commissioner of Internal Revenue of the exact basis of the claims. On November 5, 1943, the Commissioner of Internal Revenue mailed by registered mail his notice of disallowance of said claims for refund insofar as the same were based upon deficiencies asserted under Section 13 and Section 102 of the Internal Revenue Code for the years in question except-

ing only that the Commissioner determined an over-assessment of \$41.98 for the taxable year ended August 31, 1939, and an overassessment in the sum of \$85.75 for the taxable year ended August 31, 1940. On June 28, 1944, the plaintiff filed this action.

VIII.

That plaintiff during the course of this trial abandoned its claim with respect to income taxes under Section 13 of the Internal Revenue Code in the amount of \$924.46 together with the interest paid thereon.

IX.

That plaintiff corporation was not formed for the purpose of preventing the imposition of surtaxes upon its shareholders.

X.

That plaintiff corporation was availed of for the purpose of preventing the imposition of surtaxes upon its shareholders during each of its taxable years ending August 31, 1939 and August 31, 1940. In 1939, the corporation had a taxable net income of \$37,337.55 and distributed dividends amounting to only \$17,500., of which amount \$15,000. was used to purchase a ranch for the stockholders' son. In 1940, the taxable net income was determined by the Commissioner to be \$26,408.50, and in that year dividends of only \$2500. were distributed. Plaintiff's surplus account in 1933 was \$153,927.78. In 1940, this account was \$213,632.92. Plaintiff's security investments in 1940 at the end of its fiscal year had a book cost of \$157,093.29 and a fair market value of

\$114,125. As a result of the accumulations in the taxable years here involved, the plaintiff's two shareholders avoided surtaxes in their personal income tax of \$2,402.99 in 1939 and \$4,199.68 in 1940. [64]

XI.

The properties of the school in 1946 were in good repair and have not been substantially altered but have been modernized since the taxable years in question. The properties are being used at the present time for substantially the same purposes as those during the taxable years in question with the exception that the boarding school activities formerly carried on by the lessee have been abandoned.

XII.

During the two taxable years in question, plaintiff conducted no substantial activities other than the management of its investments and the receiving of rentals from the lessee of the school properties. The taxes upon the school properties were paid by the lessee under the terms of the lease. This lease also provided for certain consultations between plaintiff and the school operator.

From the foregoing facts the Court concludes:

CONCLUSIONS OF LAW

I.

That plaintiff was a holding company within the meaning of Section 102 of the Internal Revenue Code during each of its taxable years ending August 31, 1939 and August 31, 1940.

II.

The plaintiff in its taxable year ending August 31, 1939 was availed of for the purpose of preventing the imposition of the surtax upon the income of its shareholders through the medium of permitting its earnings and profits to accumulate instead of being divided or distributed.

III.

The plaintiff in its taxable year ending August 31, 1940 was availed of for the purpose of preventing the imposition of the surtax upon the income of its shareholders through the medium of permitting its earnings and profits to accumulate instead of being divided or distributed. [65]

IV.

The plaintiff has not proved that there was no purpose to avoid the imposition of surtax upon the income of its shareholders.

V.

The defendant is entitled to judgment that plaintiff take nothing and for its costs.

Dated: August 30, 1947.

JACOB WEINBERGER

Judge

Approved as to Form, as required by Rule 7(a). Dated: August 27, 1947. Dempsey, Thayer, Deibert & Kumler, by W. P. Thayer, Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 30, 1947. [66]

In the District Court of the United States in and for the
Southern District of California

Central Division

Civil No. 3727-W

MARLBOROUGH CORPORATION,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The above-entitled cause came on regularly for trial on the 25th, 26th and 27th days of September, 1945 and on the 16th day of December, 1946, before the Court, sitting without a jury; plaintiff appearing by its attorneys, Dempsey, Thayer, Deibert & Kumler, and the defendant appearing by James M. Carter, United States Attorney for the Southern District of California, E. H. Mitchell and George M. Bryant, Assistant United States Attorneys for said District; and evidence both oral and documentary having been received and the Court having fully considered the same and having made and duly entered its Findings of Fact and Conclusions of Law herein;

Now, Therefore, by reason of the law and the facts herein, It Is Ordered, Adjudged and Decreed that the defendant is entitled to judgment that plaintiff take nothing by its complaint and defendant is entitled to its costs in this behalf incurred which are hereby taxed in the sum of \$23.39.

Dated: this 30 day of August, 1947.

JACOB WEINBERGER

Judge [67]

Approved as to Form, as required by Rule 7(a). Dated: August 27, 1947. Dempsey, Thayer, Deibert & Kumler, by W. P. Thayer, Attorneys for Plaintiff.

Judgment entered Aug. 30, 1947. Docketed Aug. 30, 1947. C. O. Book 45, page 183. Edmund L. Smith, Clerk, by J. M. Horn, Deputy.

[Endorsed]: Filed Aug. 30, 1947. [68]

[Title of District Court and Cause]

NOTICE OF APPEAL TO UNITED STATES
CIRCUIT COURT OF APPEALS

Notice is hereby given that Marborough Corporation, plaintiff above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on August 30, 1947.

THOMAS R. DEMPSEY
WELLMAN P. THAYER
ARTHUR H. DEIBERT
WILLIAM L. KUMLER

Attorneys for Appellant
523 West Sixth Street
Los Angeles 14, California

[Endorsed]: Filed & mld. copy to Geo. M. Bryant, Atty. for Deft., Nov. 25, 1947. [69]

[Title of District Court and Cause]

MOTION FOR EXTENSION OF TIME FOR
FILING RECORD ON APPEAL

Comes now the appellant in the above entitled cause and moves the Court for an order extending the time for filing the record on appeal and docketing the action in the United States Circuit Court of Appeals to February 3, 1948.

WILLIAM L. KUMLER

Attorney for Appellant

523 West Sixth Street

Los Angeles 14, California

So ordered, this 29 day of December, 1947.

By JACOB WEINBERGER

Judge

[Endorsed]: Filed Dec. 29, 1947. [70]

[Title of District Court and Cause]

STIPULATION FOR ORDER TO TRANSMIT
ORIGINAL DOCUMENTS AS PART OF THE
RECORD ON APPEAL

It Is Stipulated By and Between the parties, through their respective counsel, that the District Court may enter its order authorizing the transmission of the original papers constituting Stipulations Nos. 1, 2, 3 and 4 and the original exhibits filed in the above proceedings, to the Appellate Court as part of the record on appeal in lieu of copies thereof.

Dated: March 1, 1948.

* * * * *

[Endorsed]: Filed Mar. 2, 1948. [77]

[Title of District Court and Cause]

ORDER FOR THE TRANSMISSION OF ORIGINAL
PAPERS AND EXHIBITS AS PART OF THE
RECORD ON APPEAL

Upon stipulation of the parties and for good cause
shown,

It Is Ordered:

1. That in lieu of copies the Clerk shall send to the
Appellate Court the original copies of Stipulations Nos.
1, 2, 3, and 4 and the original exhibits, filed in the above
entitled cause, as part of the record on appeal.

2. That such original stipulations and exhibits shall
be placed in the custody of the Clerk of this Court for
safekeeping and transportation to the Appellate Court.

Dated: March 2, 1948.

JACOB WEINBERGER

Judge

[Endorsed]: Filed Mar. 2, 1948. [78]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 86, inclusive, contain full, true and correct copies of Complaint for Recovery of Federal Income Taxes Illegally Assessed and Collected; Answer; Stipulation After Pre-Trial Conference; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Motion and Order Extending Time for Filing Record on Appeal; Stipulation for and Order Correcting Reporter's Transcript; Statements of Points on Which Appellant Intends to Rely; Stipulation for and Order for Transmittal of Original Documents; Appellant's Designation of Record on Appeal; Stipulation Designating Record on Appeal and Docket Entries which, together with copy of Narrative Statement of the Testimony; Original Stipulations Nos. 1 2, 3, and 4, copy of Reporter's Transcript of October 2, 1945; and Original Plaintiff's Exhibits 1 to 5, inclusive, and Defendant's Exhibits A to M, inclusive, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$20.90 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 9 day of March, A. D. 1948.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke

Chief Deputy

[Title of District Court and Cause]

NARRATIVE STATEMENT OF THE TESTIMONY

The above cause was heard before The Honorable Harry A. Hollzer on September 25th, 26th and 27th, 1945, and before The Honorable Jacob Weinberger on December 16, 1946, after the death of Judge Hollzer while the matter was under submission to him.

Appearances at all three proceedings were:

For the Plaintiff: Dempsey, Thayer, Deibert & Kumler, by William L. Kumler, Esq., 1104 Pacific Mutual Bldg., Los Angeles, California.

For the Defendant: Charles H. Carr, United States Attorney, by George M. Bryant, Assistant United States Attorney; Eugene Harpole, Special Attorney, Bureau of Internal Revenue.

During such proceedings the testimony of the following witnesses was heard by the Court and taken by the reporter:

For the Plaintiff: Eugene Overton, Morgan Adams, John C. Austin, Thompson Webb, Hugh L. Mann, and Georgia Overton.

For the Defendant: C. G. Brown.

So much of the testimony as is material and necessary to the determination of the point upon which Appellant intends to rely on the appeal is hereinafter set out.

References are to the original Reporter's Transcript of Proceedings.

EUGENE OVERTON,

a witness for the Plaintiff, being first duly sworn, testified as follows:

Direct Examination

"During the years 1939 and 1940 I was director and president of the Plaintiff corporation. I was the officer primarily concerned with the financial problems of the business. I have occupied that position since 1924. (T. 4.)

"During the taxable years ended August 31, 1939 and August 31, 1940 the earnings of the business were accumulated for the purposes of the business of the corporation. The explanation is rather long. Some of the considerations entering into my determination to accumulate earnings were: (T. 6.)

"(a) The Marlborough School is owned by the Marlborough Corporation. Marlborough School was started 56 years ago by my mother-in-law, Mrs. Mary S. Caswell. (T. 6.) Mrs. Caswell was the sole owner of the stock from the incorporation of the company, in 1910, until her death in 1924. (T. 9.) After her death Mrs. Overton inherited the stock of the corporation, and thereafter Mrs. Overton and I divided everything we had as equally as possible between us by agreement. That is how I became a half-owner of the stock of the corporation. (T. 9.) First the school was located in Pasadena and shortly after was moved to Twenty-third Street, a little east of Hoover Street in Los Angeles. By 1916 the population of the city had so shifted westerly that she determined she would have to move the school to keep up with the population. She moved it to the present location on the corner of Third and Rossmore in Los Angeles.

(Narrative Testimony of Eugene Overton)

(T. 6.) In connection with that move the corporation got into serious financial difficulties. Mrs. Caswell had not accumulated money against such a move, and, without going into details, she came very nearly going broke. At the time of her death, in 1924, the corporation was quite heavily indebted. My recollection is that we finally paid off that indebtedness, excepting debts to Mrs. Overton, my son and myself in 1934. From that time on it was my purpose and the purpose of Mrs. Overton—having had the trouble and knowing the [2*] trouble that had been gotten into and knowing even then that the population was shifting west very fast—to accumulate money against such a contingency. (T. 7.)

“(b) Another reason was that I thought—and when I say I thought, I discussed all these matters with Mrs. Overton but I think she left most of the decisions to me—I felt the school should have a very substantial backlog in case of fire, earthquake or contingencies of that kind. (T. 7.)

“(c) At that time and until 1942 the school was leased and I thought that if the corporation had to take over the management of the school on the expiration of the lease, either at its regular termination or before, it would need a considerable sum of money for renovations, improvements and things of that kind. (T. 8.)

“(d) The properties were of course depreciating. In 1939 I think the depreciation must have been close to \$170,000. (T. 8.)

“(e) I always figured in my mind that the corporation, particularly a business of this kind, which is a very pre-

*Page number appearing at bottom of page of Narrative Statement of Testimony.

(Narrative Testimony of Eugene Overton)

carious business and a very hard business to raise money on from banking institutions, should have a backlog of roughly \$250,000 and for that reason as soon as possible I started to accumulate money. (T. 8.)

"Prior to the taxable years in question I summarized the business needs to which I have referred in a pencil memorandum. My best recollection, and it is only a guess, was that it was made along about 1936 or 1937. It was merely for my own information and I just stuck it in the minute book loose. The purpose was to satisfy myself as to whether or not my belief was correct that this corporation should have a backlog of around \$250,000. Then later, maybe a year or a year and a half later, I made a second memorandum which I had typed and this is it. I failed to put a date on it. (T. 10-11.) Then I made another memorandum in the minute book, dated November 7, 1939, which I signed and put in the minute book. It follows the index of the minutes. (T. 12.)"

(At this point in the testimony the undated memorandum was offered and received in evidence as Plaintiff's Exhibit No. 1, and the memorandum dated November 7, 1939 was offered and received in evidence as Plaintiff's Exhibit No. 2.)

Mr. Overton resumed.

Q. By Mr. Kumler: "Mr. Overton, referring to Plaintiff's Exhibit No. 1, [3] which is your undated memorandum, and your testimony relative to the reasons for accumulating funds in this corporation in the years 1939 and 1940, item No. 1 is in the amount of \$20,000, to cover a possible fire loss not compensated for by insurance, estimated at \$20,000. Will you please explain the business purpose involved in that provision?"

(Narrative Testimony of Eugene Overton)

A. "Yes. I would first like to explain that memorandum a little more. That memorandum was a very informal one. In fact all three of these memoranda of mine were informal. They were not based on a careful study. They were based on estimates I made. Some of the matters, after discussion with Mrs. Overton, were estimates I made of possible or probable needs of the corporation. They were not based on accountant's or auditor's or Price, Waterhouse figures. So I don't want the impression gotten out that they were accurate in any sense of the word. They were figures I made more to see if I was justified in my own mind that the corporation ought to reserve or accumulate. To answer your question, we always kept the buildings quite heavily insured. (T. 13-14.) I knew from experience, as anyone does, that in case of fire loss the insurance never covers the loss. So I estimated \$20,000 was a conservative amount to put down as the difference between what would be collected, if there were a conflagration, and the amount that would be lost. There was a considerable fire risk. The coverage today is very little different, if any, from the coverage then. There were three policies totalling \$190,765. Those were all 90 per cent co-insurance policies. Then we carried what I called contingent liability for rebuilding. I had a good deal of trouble getting this type of insurance but it is to help cover the difference in cost of rebuilding the buildings, under present ordinances, which would have to be fireproof. The contingent liability insurance amounts to \$119,000 and is purely contingent insurance to cover the difference in cost nowadays and what it [was] would have been. The contingency insurance was in effect during the taxable years." (T. 14-15.)

(Narrative Testimony of Eugene Overton)

(On the following day the witness amplified the foregoing testimony as follows.)

"I would like to add to a statement I made yesterday when we were discussing the informal memorandum. I forgot another serious contingency in case of fire or earthquake. If during the school term the school should have a serious [4] fire loss, so it could not be operated, it would require a great deal of free capital to meet the obligations to return the tuition, pay the teachers who are under contract, and the help and all those things. There are those three considerations I always had in mind in wanting to accumulate a fund. (T. 147.)

* * * * *

"Directing my remarks to the taxable years in question, the second item in Plaintiff's Exhibit No. 1, in the amount of \$15,000, is an item I got after discussion with Mrs. Overton. She has felt for years that the boarding department should be dispensed with. She was the authority on the school angles, while I claimed to be the authority on financial angles of the business. She, in discussing it, told me that if and when the corporation again took over actual operation of the school because of termination of the lease, one of the first things she would do would be to dispense with the boarding department. In doing so she would then endeavor to increase the day school and that would need considerable remodeling of the bedrooms and turning them into classrooms and things of that kind. It was actually done as soon as Mrs. Overton took over the principalship of the school in 1942. (T. 16-17.)

"The \$35,000 item shown in Plaintiff's Exhibit No. 1 was obtained after discussion with Mrs. Overton. The

(Narrative Testimony of Eugene Overton)

gymnasium, showers, dressing rooms, locker spaces and those things were then badly in need of remodeling and modernizing; for instance, it should all be sealed. A school of that kind has to be kept in first-class condition. That is old-fashioned. It was built in 1916 and not at all according to modern requirements. That was going to cost a considerable sum of money. That was one item involved in the \$35,000. Maybe it was the only one; I don't know. It will cost a lot of money to do it and it has got to be done as soon as labor and materials can be gotten. (T. 20.)

"The estimate of \$50,000 for working capital in the event the lease is terminated and active conduct of the operation is resumed is just an estimate. I stated in the memorandum, 'So far as can be foreseen at the present time, these probable business requirements and contingencies are believed to be as follows.' I did not consider this a definite or accurate statement as to computation and I don't yet. We knew or presumed we would have to take over the operation of the [5] school. To operate the school during the summer months, pay the help, pay the staff that has to be kept which is considerable, and for food, operating expenses, lights, furniture and a certain amount of repairs that have to be made every summer would cost \$20,000 to \$25,000. Then there should always be a considerable reserve for unforeseen contingencies. So without being able to give the items, I felt at that time that a \$50,000 working capital was a conservative estimate. (T. 21-22.)

"The \$67,000 item in Plaintiff's Exhibit No. 1 covers two factors. The books showed a large depreciation which I felt ordinary good business judgment required should be

(Narrative Testimony of Eugene Overton)

covered as far as possible. I think I stated that in 1939 the depreciation on the books was \$170,000. Then, the possibility or probability of having again to move the school was a very serious consideration and still is, and that was taken into account in the figure, which, incidentally, I have since learned is rather inadequate. (T. 22.)

"I probably put down 'obsolescence' and 'depreciation' more or less thoughtlessly. I am not an accountant. What I think I meant by that was the difference in cost, if the school had to be moved. (T. 23.)"

The Court: "May I interrupt here to see if I understand this last answer? Do you have anywhere in that memorandum set down a rough estimate of what would be required to modernize the whole structure or combination of structures?"

The Witness: "Yes; in this way, I think, your Honor. We have already discussed that item of \$35,000, which I have down here as additions to buildings and new buildings that may be required, estimated at \$35,000; to provide for working capital if the present lease on the school should be terminated, \$50,000. This also not only was necessary, the \$35,000 for operating expenses and for renovation during the summer months, but necessary to provide money for renovating, painting, and all kinds of repairs and modernizing, wall papering, and all those things we knew would have to be done. Does that answer your question?"

The Court: "Is that the last item to which you are referring?"

The Witness: "The last item is the item of \$67,000 to provide for obsolescence and depreciation.

(Narrative Testimony of Eugene Overton)

The Court: "That is what I say. It isn't clear to me what distinction in your estimates you drew between the items already described and the [6] other items that you included under this last estimate of some \$67,000.

The Witness: "As to the \$67,000 item, as I say, the corporation's books showed a large depreciation in the value of the buildings and in the furniture and fittings and so on. I was trying to set up a reserve, to equalize the depreciation shown on the books, entirely outside of the amount necessary for renovating, new constructions, and things of that kind. (T. 23-24.)

"The contingency insurance carried to cover the excess cost of rebuilding which would have been due to the difference in building codes and the requirements of the laws with respect to school buildings, would not have covered the excess cost. I had that definitely in mind in the considerations summarized in the memorandum. (T. 25.)

"In the event the buildings were 'replaced' the insurance wouldn't cover it at all. The \$67,000 item, which I termed 'obsolescence' and 'depreciation' undertook to take that factor into account. Incidentally it wasn't with the idea of it ever being analyzed in a proceeding of this kind. Otherwise, I would have been more careful with it. I (Eugene Overton) wanted it in the minute book in case anything happened to me and Mrs. Overton. We went to sea a great deal and might get drowned, and I wanted it there, so that our son, our only child, would be able to base his action on it in connection with the school business. So it had a double purpose. My estimate of \$67,000 was quite inadequate. (T. 26.)

"The indebtedness to Mark Overton, Georgia C. Overton and Eugene Overton of \$35,500 was the same as that

(Narrative Testimony of Eugene Overton)

shown in my sheets for 1939 and 1940 fiscal years. (T. 26.)

"Plaintiff's Exhibit No. 2 shows an item of \$75,000 for obsolescence and depreciation whereas plaintiff's Exhibit No. 1 shows \$67,000 merely because new building costs were increasing. I had a very rough estimate which I have since found was very wrong of what the difference in cost would be in case the school had to be rebuilt or moved and that is the reason for the difference. (T. 29.)

"The item of \$35,500 representing indebtedness to the Overtons is absent from the second memorandum because I presume I forgot to put it in. The indebtedness has never been paid. (T. 29.)

"Borrowing for school purposes is extremely difficult as I stated earlier. A school is not, in banking circles, a good risk and it was my experience, based on what I learned in the early days, when Mrs. Caswell was trying to borrow money that it is extremely difficult to borrow more than the bare value [7] of the land because it is a specialized type of building and because a school anyway is a great risk. If we had to borrow as much as possible I think a bank or loaning agency would be extremely hesitant to loan more than 50 to 60 per cent of the base value of the land the school was on. (T. 29-30.)

"The only experience I have had with school financing is in connection with Marlborough. I have never been connected, either as counsel or otherwise, with any other school. So anything in that connection would be hearsay on my part. The best way to illustrate will be to give the history of the borrowing of the school as a corporation. In 1916 or 1915, when Mrs. Caswell decided to move the school she had practically no reserve. She had

(Narrative Testimony of Eugene Overton)

her old school property. First she arranged for the purchase of the property where the school now is from G. Allen Hancock, who was then subdividing the whole area and thought the school would benefit his tract. He sold her the property at a give-away price. She paid \$14,000 for 200 feet on Third Street and 712 and a fraction feet on Rossmore. Mrs. Caswell had the plans for the school drawn by Mr. John C. Austin. The corporation then made a contract with a contractor to build what we call the main building and he agreed to take the old school property down on Third [Twenty-third] Street in at, my recollection is, about half the contract price. Then Mrs. Caswell had to provide the difference between that and the seventy some thousand dollars. In other words, as I recall she had to provide about \$35,000 or \$40,000 in cash to make up the difference. She tried to borrow that and frankly, she couldn't borrow it. This is part of my knowledge. I was part of it at the time. Finally I made arrangements with the Mortgage Guarantee Company to borrow, I think it was, about \$52,000 which was necessary for the difference in the building cost and for the expense of moving, laying out the grounds and new furniture and all incidentals. Mrs. Caswell found it impossible to borrow the money and finally, through my personal actions with the Mortgage Guarantee Company and with Mr. Morgan Adams who was, I believe, president of it then, I succeeded in making that loan and I had great difficulty. But it was not made with the Mortgage Guarantee Company but with the Bond Investment Company, a subsidiary of the Mortgage Guarantee Company. The Corporation borrowed \$52,500 and gave a first lien trust deed to secure three notes, one for \$40,000, one for \$2,500 and

(Narrative Testimony of Eugene Overton)

one for \$10,000. The Bond Investment Company wouldn't make the loan unless the \$10,000 note was otherwise secured and finally [8] G. Allen Hancock endorsed that \$10,000 note. Then the Corporation had to give a second mortgage to Mr. Hancock to secure him. Then Mr. Hancock loaned \$14,000 personally which he required me personally to guarantee. A third mortgage was given to me and I assigned it to him to secure the \$14,000 I had guaranteed. It was a pretty involved situation. The school was in dire financial straits and had it not been for the fact that we were able to make these loans in that way and the fact that Mr. Hancock was willing to accept my guarantee for \$14,000 and in those days \$14,000 looked like a lot of money to me, the school would have failed, definitely. (T. 32-35.)

The Court: "I would like to clear up one item which is not clear at least in my own mind. Did I understand you to say that the Bond Investment Company loaned \$40,000 on a first lien against the property?"

The Witness: "Yes. May I read this again to your Honor? This is a memorandum that I made recently from the books and records of the corporation. I made it myself. On May 27, 1916, the corporation borrowed \$52,500 from the Bond Investment Company and gave a first lien trust deed to secure three promissory notes, one for \$40,000, one for \$2,500 and one for \$10,000. Then the \$10,000 note was also guaranteed or endorsed by Mr. Hancock. Then, in addition to that, Mr. Hancock loaned \$14,000, which was found to be needed, which note was \$14,000 I endorsed.

(Narrative Testimony of Eugene Overton)

The Court: "Did the Bond Investment Company receive any other security or personal guarantee on the first lien so far as the \$40,000 was concerned?"

The Witness: "The \$40,000 was secured only by a lien on the property.

Q. By Mr. Kumler: "Mr. Overton, from what sources did the funds come to repay these loans?"

A. "From the earnings of the school.

Q. "Did you pay interest on the loans?"

A. "Oh, yes.

Q. "What effect did the payment of interest have on your earnings?"

A. "Of course, it reduced the earnings.

Q. "And then it reduced your ability to repay?"

A. "Certainly. [9]

Q. "During the years 1939 and 1940, was the corporation actually conducting the school business, that is, the academic part of it?"

A. "The corporation was not conducting the academic end of the school business. The school was under lease at that time to a Miss Blake.

Q. "Was it a written lease?"

A. "Yes; and the school, or the corporation, had the right to certain supervision under the terms of the lease.

Q. "Mr. Overton, I am showing you Exhibit A to Stipulation No. 3, which is a lease agreement between the Marlborough Corporation and Ada S. Blake. I will ask you if that is the lease that was in effect during the taxable years.

A. "The lease is dated September 1, 1935. That was in effect. There may have been some modifications, and I think very probably there were, by 1939.

(Narrative Testimony of Eugene Overton)

A. "I would have to look at my records to see, but this was the basic lease at that time.

Q. "Were the modifications in the terms of the lease or in the amount of the rental? Can you state to what the modifications were limited?

A. "I would not want to state that without looking at my records. Do you want to take the time?

Q. "Will you look on page 10 of the lease and tell the court whether the provision entitled 'VII. Policies, Salaries, General Expenses, Permanent Improvements—' well, just a minute. Will you excuse me a minute, your Honor, until I compare this with the original? Yes; that is it. 'VII. Policies, Salaries, General Expenses, Permanent Improvements.' I would like to have you examine that provision and tell the court if that provision was in effect during the taxable years, without modification.

A. "Yes; that provision is in effect at this time and had been in effect since the school was first leased to Miss Blake. That provision was in effect in all of the prior leases.

Mr. Kumler: "I would like to read a portion of that provision. 'It is understood that the lessee, during the term of this lease, shall have the entire control and management of the school in all its branches and departments without interference by the lessor; provided, however, that the lessee shall [10] not, without first obtaining the written consent of the lessor, make any fundamental or material change in any existing policy or plan upon which the school is now being conducted, or any general change in the present scale of salaries paid to teachers in the school, or any change in the present method of conducting the school which would involve a material increase or decrease

(Narrative Testimony of Eugene Overton)

in the cost of conducting it, or any addition, alteration, or permanent improvement to the premises, as distinguished from repairs and renewals incidental to upkeep.'

Q. "I will ask you, Mr. Overton, whether the powers and rights reserved in that paragraph to the lessor were exercised by the lessor during the time the lease was in effect.

A. "Yes; those powers were exercised at intervals over or during the entire tenancy of Miss Blake, under the provisions of the lease and those only.

Q. "Can you specify some of the occasions on which they were exercised?

A. "That is pretty hard to do. I personally—

Mr. Bryant: "Just one moment. I think I am going to object to this line of testimony. I presume it is sought to show the rights of operation retained by the corporation under the lease. That is a legal question which may be deduced from the terms of the lease which is included in Stipulation No. 3; and I feel that it is a question of law as to what their rights of operation were that were retained.

Mr. Kumler: "Would counsel like to stipulate it is presumed they exercised the rights they had under that section?

Mr. Bryant: "I think the witness has already testified to that; that they exercised whatever rights were retained under the lease.

Mr. Kumler: "Very well; we will pass on.

The Court: "This seems to be an appropriate hour for the noon recess." (T. 35-39.)

(Narrative Testimony of Eugene Overton)

(Mr. Overton's testimony, having been interrupted to convenience other witnesses, was resumed.)

"I can't say that, in 1939, we had definite plans with respect to operation of the school after the expiration of the lease in 1942. We didn't know whether we were going to renew the lease, let it terminate, or whether [11] Miss Blake wanted to renew it, but at that time there was a little question of whether or not we might not terminate the lease because of defaults. But we didn't. (T. 144.)

"When the lease did expire, we did not renew it. (T. 145.)

"Very definitely, the possibility of resuming active conduct of the school activity, was a consideration in our minds in 1939 as well as 1940." (T. 147.)

(At this point Mr. Overton added to his testimony of the previous day with respect to the provision in his informal memorandum relating to fire and earthquake contingencies. This correction has been noted, ante, at pages 4-5, of this Narrative Statement. It is not repeated here.)

"The business factors involved in our provision for the possibility of moving the school was, mainly, the westward trend of population that was taking place in the city before and during 1939 and 1940, long before. It is exactly the same factor that Mrs. Caswell ran up against and had to take into consideration when she moved to the present location. An analysis of the school attendance will show that during all those years and right up to the present time, the westward trend has been very marked; I mean the westward trend as to residences of pupils of the school.

(Narrative Testimony of Eugene Overton)

The percentage east and west of Rossmore has changed very materially towards the west. And we have always, for many years considered the very serious probability that the school would have to be abandoned where it now is and moved farther west.

“Page 3 of Stipulation No. 2, a tabulation of the shift of population as indicated by the location of residences of the day school students, from 1923 to 1945 was prepared under my direction (T. 148) and most of it by me. I was aware of the existence of the trend in the taxable years. I had not tabulated it as I have recently done. It is a matter that Mrs. Overton and I were watching all the time and discussing from time to time. We knew generally the trend without having tabulated it. We didn't know in 1939 and 1940 when such a move would become necessary and don't now.

“If the school is too far away from the residences of the students as it was when it was down on 23rd Street, and when Mrs. Caswell moved it in [12] 1916, the attendance drops off very materially, and eventually it would drop off to such an extent that the school could not be operated profitably and break even. (T. 149.)

“Consideration of the possibility of moving also involved the question of more room. The school is crowded for room. It hasn't enough grounds around it and the restrictions won't permit us to buy additional property for school purposes. I am not an expert on the school needs other than financial. I think Mrs. Overton is better qualified than I as to the needs for facilities, but I know the school needs, badly, more athletic fields or room.

Q. “Mr. Overton, I show you a schedule of depreciable assets and accumulated depreciation, appearing on page 2

(Narrative Testimony of Eugene Overton)

of Stipulation No. 2, assets owned by the corporation, and I would like to have you tell the court, if you will, which of those assets described in that schedule may be saved and moved to a new location if the school was moved.

A. "I would like to take a moment to look this over. The first one listed is frame school buildings. Those, of course, could not be moved. The second one is auditorium. That could not be moved. The third one is auditorium fixtures. I don't know what is meant by that. If it means fixtures such as electric appliances, some of those might be used; I don't know. I don't presume that means desks and furniture and things of that kind which could be moved.

Q. "I assume it means lighter fixtures, those things affixed to the building.

A. "Yes. Plant and machinery I would say couldn't be moved. Tennis courts obviously could not be moved. The sprinkler system could not be moved. The auto could be moved, if it would run. Linens, silver and dishes, yes, those could be moved. Here again is furniture and fixtures and there is an asterisk there. I would say that the furniture could be moved and as to the fixtures it would be doubtful. Some might be. The rugs, yes.

Q. "In view of the fact, Mr. Overton, that the schedule shows the rugs to be completely depreciated, would it be feasible, as a practical matter, to move the rugs? (T. 150-151.) [13]

A. "Well, yes; I think it would. There again, Mrs. Overton can tell you better than I know how good those rugs are. But, with due respect to the bookkeepers, because a thing is completely depreciated doesn't always mean it is not usable.

(Narrative Testimony of Eugene Overton)

Q. "In 1939 and 1940, Mr. Overton, did you have in mind the amount of money which would be necessary to buy land and erect new buildings at a new location if the school were moved?

A. "No; I can't say that we had in mind any definite sum any more than we had in mind any definite location. That was something that had to wait until the time to move and then pick the location and pick the land. So I couldn't say that we had anything definite as to figures or location in mind.

The Court: "May I interrupt to ask the reporter to read the question?"

(Question read by reporter.)

The Witness: "I knew, Mr. Kunler, that it would take a large amount of money. There was no way of figuring, as I say, definitely the amount until the time arrived to make the move, but, as I have stated several times before, the accumulation of funds to cover what I knew was the minimum that would be required was what I had in mind.

The Court: "Let me interrupt here to see if I understand the last answer. According to the reports, certain reserves have been accumulated. And did you give some thought as to whether or not these reserves were or were not in excess of those which, from general thinking, you believed that you would have to call upon?

The Witness: "Yes; I gave a lot of thought to that. Perhaps I had better explain that in this way to your Honor. As I believe I said yesterday, I had it in mind always that the school should have a cash or liquid security reserve of \$250,000. That was to cover or to provide as far as possible against the various contingencies

(Narrative Testimony of Eugene Overton)

that I mentioned. I knew, without having set down actual figures, that the school, if it had to move, would need more than \$250,000 for the purchase of land, buildings, new buildings, and so forth. It would have been silly for me to establish, for instance, or try to say that I was going to establish, a \$350,000 or a \$450,000 reserve, which is what I (T. 151-153) [14] think now and did then was the least that would be needed, because we couldn't do it. The profits over the years wouldn't justify it. There is no use reaching for a star when you can't reach it. So I took what I thought was a conservative stand in saying 'Well, let's accumulate \$250,000.' That was something that was in sight; that I saw that could probably be done within a reasonable time. But, as a matter of fact, it has not been reached yet. Does that answer your question?

The Court: "Yes.

"At the time Mrs. Overton and I considered the amount of dividends to be distributed for the years ended August 31, 1939 and 1940, and the amount to be retained, the matter of the tax effect on dividends paid was never discussed or raised. In handling the school funds I don't think I ever paid any attention to the tax angle. I won't say I didn't have it in mind. In the practice of law (T. 153) you have tax matters in mind all the time. But I did not let it influence my conclusions in any way; I made no computations and haven't to this day on the tax angle.

"The plaintiff has never loaned funds to its stockholders. Just the reverse. Mrs. Overton and I have loaned, I think, to pay off indebtedness, each \$20,000 or a total of \$40,000 to the school, which loans are still partly unpaid.

(Narrative Testimony of Eugene Overton)

The corporation has been indebted to Mrs. Overton and me since 1934, I think. I would have to look at the records.

Q. "I think the Stipulation shows that it was October 26, 1925.

A. "1925 that we loaned \$40,000?

Q. "The sum of \$40,000 to pay off the loan to the Mortgage Guarantee Company. Has that loan to the corporation been unpaid since that time?

A. "That loan of Mrs. Overton and mine, yes. Well, no; it has been partly paid or partly liquidated in a certain manner.

Q. "Do you recall what the balance is today?

A. "I think the amount due me is about \$5,500.

Q. "I mean the total balance owing to you.

A. "Yes; the total amount owing to both of us now, I think is \$20,000. I am not sure of that figure but I think so. (T. 153-155.) [15]

Q. "Mr. Overton, have the stockholders of this corporation ever transferred personal assets, such as residences, apartments, yachts, automobiles, or other similar property, to the corporation, which thereafter stood the expense of upkeep of the same?

A. "What is the question?"

(Question read by the reporter.)

Q. "With respect to which the corporation paid the cost of upkeep but the stockholders got the use?

A. "No, no; never.

Q. "Mr. Overton, have any profit-yielding properties, such as bonds, securities or oil properties, been transferred to this plaintiff corporation for the purpose of escaping personal surtaxes?

A. "Never.

(Narrative Testimony of Eugene Overton)

Q. "Mr. Overton, from 1910 to 1940 inclusive, a period of some 30 years, the stipulation does show that the earnings accumulated amounted to \$213,000, or an average over a year of \$7100. Did you, in 1939 and 1940, have the time element involved in accumulating those earnings over that period when you considered the amount that you would need in business?

A. "I don't understand your question as to the time element.

Q. "Let's put it this way. The stipulated facts show that the average rate of your ability to accumulate earnings from the corporation after the payment of taxes and dividends is \$7100 a year. When you were looking forward to these figures to which you have testified, did you have in mind the time element involved in accumulating the funds necessary?

A. "I had in mind, as I just stated to the court, that it was going to take a long time even to accumulate \$250,000 and it hasn't arrived yet.

Mr. Kumler: "That is all." (T. 155-156.)

Cross-Examination—Eugene Overton

"I can't answer whether, in 1937, 1938, 1939 or 1940, I discussed with accountants or other attorneys the surplus on hand. I assume that Price, Waterhouse, in making their audit discussed such matters and brought up some points. (T. 156.) I don't think I could specify any definite [16] conversations. I seem to have a recollection that those things were discussed to some extent.

"I had no assistance in preparing the memoranda, [plaintiff's] Exhibits 1 and 2. As I said yesterday, I sat down with a pencil and just made them up in my own

(Narrative Testimony of Eugene Overton)

mind, informally, and purely for my own satisfaction and incidentally with no idea that they would ever be for publication. Most of the figures I got out of my head. Some, on the additions to buildings and those things I got from Mrs. Overton. I am referring to items 2 and 3 in Exhibit 2, the remodeling of buildings in the event it is decided to eliminate the boarding department and for other contingencies. Yes I know I got from Mrs. Overton the additions to buildings and new buildings that may be required, that is item 3, of \$35,000. I know I got part and I must have gotten all of it from Mrs. Overton because I was not keeping in touch with the school's (T. 157) physical or academic needs.

"I think none of the discussions were recorded in the minutes. Our directors meetings were very informal. For a long time Mrs. Overton was not even a director. She was not a director during the taxable years in question. She resigned in May, 1938. At that time she was spending a lot of time at her ranch in the Mojave Desert and on one or two occasions when I needed her to hold a meeting I couldn't get her. So I suggested that she resign and I would put my secretary in her place.

"However, I was discussing my actions at all times with her. I never took any action (T. 158) that Mrs. Overton, I think, didn't know about."

(At this point defendant offered and there was received in evidence defendant's Exhibit C.)

"Mrs. Overton was again elected a director on June 29, 1942. That was after the taxable years in question."

(At this point defendant offered and there were received in evidence defendant's Exhibits "D," "E," "F," "G," "H," "I," "J," "K," "L" and "M.") (T. 159-162.)

(Narrative Testimony of Eugene Overton)

(Thereafter the cross-examination of Eugene Overton was resumed.)

"I would like permission to correct the testimony as to two or (T. 163) [17] three items."

(The Court granted permission.)

The Witness: "I stated yesterday that we were discussing the loans made by the Bond Investment Company to the Marlborough Corporation and that they were entirely paid out of earnings. That was incorrect. Those were paid, to the extent of \$40,000, out of the loans I testified to this morning that were made by Mrs. Overton and me to the corporation. We each loaned \$20,000 to the corporation and that money was used to pay the Mortgage Guarantee Company or the Bond Investment Company loans. I think that is an accurate statement. You asked me this morning about several discussions with Price, Waterhouse relative to accumulations and I stated I didn't remember any. As I was going out, Mr. Benson, who was with Price, Waterhouse at that time, reminded me that there had been some discussion or at least that they had mentioned to me the accumulations, in about 1939, I think it was, or 1940, and merely called my attention to that, and that I had stated I thought they were justified, or words to that effect. That is all he remembered and that is all I remember.

Q. "Is Mr. Benson in the courtroom now?"

A. "He is not now. He was this morning. Your Honor asked me this morning as to whether any loans had been made to the stockholders and I had forgotten for the moment. I ran across this the other day in going over the minutes to refresh my memory—

(Narrative Testimony of Eugene Overton)

Q. "Was that the temporary loan, Mr. Overton, made pending the payment of dividends?

A. "Yes; in 1932, a loan of \$1,000 to Mrs. Overton. I haven't and Mrs. Overton hasn't any recollection as to why that loan was made or anything. It was a loan of four or five days. As far as I recall, that is the only loan that was ever made.

Q. "In reference to the loans, Mr. Overton, that you have just referred to, who loaned that money to the corporation?

A. "You are speaking of the loans of \$20,000 each?

Q. "Approximately \$20,000 each.

A. "Mrs. Overton loaned \$20,000 out of her separate estate and I (T. 163-164) [18] loaned the same amount.

Q. "Did Mark Overton loan any of the money?

A. "No.

Q. "I notice that in your notes payable, of which I have a record only, beginning with 1931, you have a note payable to Mark Overton in the sum of \$14,986, from 1931 to 1933. Then, from 1934 through 1940, that loan was \$15,000.

A. "That loan is still \$15,000, Mr. Bryant, and still continues.

Q. "What did that arise from?

A. "That arose in this way. My mother-in-law, when she made her will, wanted to leave him a fairly considerable sum of money in her will. Mrs. Overton and I both objected as far as we had the right to object and asked her not to leave him money in her will and suggested to her, in the first place, that we hoped that she would not leave him out but he was a pretty young kid then and I didn't want him to think, when he was 21, he was coming

(Narrative Testimony of Eugene Overton)

into a considerable sum of money, and asked her to leave it in a note or letter to Mrs. Overton and, when we thought it was proper for him to have it, we would pay it to him out of her funds. And that is what she did; she left a note asking that that be done. And we didn't let him know even that that money was coming to him until he decided he wanted to get married and we thought then it was time we paid it. So we paid him \$5,000 in cash out of the school funds and he asked for the balance in a note because he thought it was a good investment to keep it that way, and it has continued that way ever since. Then shortly after that, Price, Waterhouse took exception to the way I had done it, paying it out of school funds, saying that the Corporation couldn't give away money. Of course, technically, they are correct. It was worrying them and I didn't care, even though there were no stockholders or creditors to take exception to it, so I think I suggested that Mrs. Overton and I each be allowed a credit on the \$20,000 notes that the corporation owed us, a credit of \$10,000 each, to take care of the money that was paid to our son. So actually the money came out of Mrs. Overton and me and not out of the corporation.

Q. "When was that done? (T. 164-166.) [19]

A. "I can't tell you that.

Q. "Approximately?

A. "I can't tell you that. It is all shown, I think, in the minutes. I would have to look through them. It was done quite a few years ago.

Q. "Prior to 1931?

A. "When was the first loan made to him?

Q. "The only figure I have is it commences in 1931 and is carried through from that time.

(Narrative Testimony of Eugene Overton)

A. "Well, it was made, that shift, taking it out of Mrs. Overton and me instead of out of the corporation. That was made very shortly after the first payment to him and loan to him was made.

Q. "You loaned money to him?

A. "No; we gave him \$5,000 and then we gave him a note for \$15,000. It wasn't actually a loan.

Q. "Where did that money come from?

A. "It was merely carrying out the wishes of Mrs. Caswell which she left by letter. And, incidentally, I have that letter some place. What was that last question?"

(Question read by reporter.)

A. "Which money?

Q. "The \$5,000.

A. "The \$5,000 first came out of the corporation but shortly afterwards it came out of Mrs. Overton and me by reason of changing our notes, reducing the notes to us by \$10,000 each.

Q. "That is to say, then, you gave him \$5,000 plus notes for \$15,000?

A. "That is correct.

Q. "Of the corporation?

A. "Yes.

Q. "And you paid back to the corporation or took credit?

A. "No; I gave the corporation credit for \$20,000.

Q. "For \$20,000?

A. "Yes. Here is that letter, Mr. Bryant. (T. 166-167.) [20]

Q. "I am not particularly interested in the letter. The balance upon the notes is still \$21,500, the total balance?

A. "I think that is what the record shows.

(Narrative Testimony of Eugene Overton)

Q. "\$6,500 and \$15,000?"

A. "That is about it; yes.

Q. "And those balances were the same in both of the taxable years?"

A. "Yes. This is even carried on during the years.

Q. "How much interest has been paid upon those notes?"

A. "I think they are 7 per cent notes.

Q. "And you thereafter received, each year, upon \$6500, 7 per cent interest?"

A. "That is right, if it is 7 per cent; I am pretty sure it is; whatever the interest is.

Q. "And Georgia Overton, upon \$14,000, receives 7 per cent?"

A. "That is right.

Q. "And Mark Overton receives the same amount?"

A. "On \$15,000.

Q. "You have been able, at any time since at least 1925, to pay off those notes, have you not?"

A. "Yes.

Q. "At will?"

A. "Yes. Well, wait. You say since 1925? I don't remember the condition of the corporation's accounts back in 1925. I am not so sure but the corporation could have paid them off at any time in later years.

Q. "Well, say on August 31, 1931, it could have paid them off, could it not?"

A. "Well the corporation didn't get out of debt until 1934. It owed a considerable sum of money to the Spaulding Company on a loan that was made to build the auditorium building.

(Narrative Testimony of Eugene Overton)

Q. "Is that the mortgage, payable for the auditorium, due January 31, 1931?

A. "I presume it is. (T. 168-169.) [21]

Q. "And you retired that \$10,000 in 1932 and \$30,000 in 1933?

A. "I don't remember but I remember that the corporation was out of debt in 1934 excepting the indebtedness to Mrs. Overton and me and Mark.

Q. "That is the only indebtedness now due?

A. "That is all.

Q. "What is the maturity date of those notes?

A. "Do you mean to Mrs. Overton, my son and myself?

Q. "That is right.

A. "I can't tell you that. I renew them from time to time. I don't remember the maturity dates of them.

Q. "They have merely been renewed and you are just letting them stay there for the purpose of earning interest?

A. "No. As a matter of fact, I don't want interest. I am letting them stay there for the purpose of keeping a good, big balance in the bank account in the Marlborough Corporation. That is as to Mrs. Overton and me but, as to my son, he wants it that way. He wants it for the purpose of earning interest.

Q. "Are you familiar with the dividends paid by the corporation?

A. "I think so, in general.

Q. "What is your invested capital? Is it \$50,000, your capital stock?

A. "Authorized capital?

(Narrative Testimony of Eugene Overton)

Q. "Yes.

A. "\$50,000, I think. I think that was the authorized capital when I organized and incorporated the company in 1910. Yes; I am pretty sure it was \$50,000.

Q. "And it has remained the same, without change, since the time the corporation was organized?

A. "Yes.

Q. "In 1937, if I told you that the dividends paid were \$2,500, would you say that was correct?

A. "In 1937? (T. 169-170.) [22]

Q. "Yes; the fiscal year ending in 1937.

A. "I think so. We established a dividend policy of \$1.25 a share, I think, quarterly, and I don't remember when that began but I think it was in effect in 1937.

Q. "That amounted, approximately, to 5 per cent per year, did it not, on invested capital?

A. "I never figured it that way.

Q. "You merely wanted a yield of \$1.25 per year per share?

A. "That is all.

Q. "In 1938, for the fiscal year ending that year, is it not true that there was an extra dividend declared in the sum of \$3,000? What was the purpose of that extra dividend?

A. "I haven't any recollection at the moment. What date was that, Mr. Bryant?

Q. "For the fiscal year ending August 31, 1938.

A. "Do you know in what minutes that appears?

Q. "No; I don't. I have it from an analysis of your surplus.

A. "I guess you are more familiar with these books than I am.

(Narrative Testimony of Eugene Overton)

Q. "I have never seen the minute book.

A. "I know it has been quite a few times. This is off the record. There was a dividend, in May, 1938, of \$6.00 per share. I remember what that was for. That would appear in the minutes of 1939 probably.

Q. "It would be for the fiscal year ending August 31, 1938, the particular dividend in question?

A. "I don't seem to find any record of that.

Q. "I think it was prior to May, 1938.

A. "Prior to May, 1938?

Q. "I imagine it would be.

A. "I don't find anything and I am looking back to 1936 now.

Q. "You have no minute therefor in your books, authorizing the declaration of any dividends in the fiscal year ending August 31, 1938?

A. "Excepting that regular dividend of \$1.25 per share, which I see (T. 170-172) [23] was first authorized in January, by the minutes of January 8, 1936. 'Resolved that quarterly dividends on the stock of this corporation be and are hereby declared in the amount of \$1.25 per share per quarter, payable thereafter on the first days of April, July, October and January, to the stockholders of record five days prior to the date each dividend payment is payable.'

Q. "How many shares of stock are authorized by the Corporation Commissioner?

A. "There wasn't a corporation commissioner in those days, Mr. Bryant, but 500 shares were authorized. Wait a minute. Here is a dividend of \$6.00 per share, on the 13th of May, 1938. That would be \$3,000.

(Narrative Testimony of Eugene Overton)

Q. "That is \$6.00 per share?

A. "That is right.

Q. "And do you remember what that money was used for?

A. "No; I do not.

Q. "Directing your attention to the fiscal year ending August 31, 1939, and particularly to the month of January, 1939, was there an extra dividend declared in that year in the amount of \$15,000?

A. "There was \$30 per share.

Q. "And for what purpose was that dividend?

A. "That was to carry out the intent and desire of my mother-in-law as to my son, as I explained a few minutes ago. That money that she was to have given him, or wanted to give to him, as I explained, came finally out of Mrs. Overton and me. You might say it was sentimental but my son wanted a ranch and had an opportunity to buy one, and Mrs. Overton and I felt that, to carry out that intent and wish, the only fair thing was to do it. The price of the ranch was \$15,000—that is, the right thing to do to carry out her mother's wishes. So, to get around any second complaint from Price, Waterhouse, I declared a dividend or had a dividend declared, by which Mrs. Overton got \$7500 and I got \$7500, and we used that to pay for the ranch.

Q. "And that made a gift of the ranch to your son?

A. "That is right; later. We first put it in trust and then later made a gift of it to him. (T. 172-173.) [24]

Q. "When was the ranch given to your son?

A. "The operation of it was turned over to him immediately but the actual title to it was given to him quite a bit later.

(Narrative Testimony of Eugene Overton)

Q. "Do you remember when?

A. "No; I can't tell you when but I think we gave him a quarter interest—no; I can't remember the dates. I will tell you what we did, however. We turned over to him an undivided interest. I think it was a quarter one year and a quarter the next year and I think the remaining half the next year. He sold the ranch then. And the reason for that was to avoid the gift tax on Mrs. Overton and me.

Q. "By reason of the fact that the amount would be over the exemption?

A. "The value would be under the exemption.

Q. "And you consulted regarding the gift tax?

A. "No; I didn't need to consult about that. I don't know much about taxes but I do know that.

Q. "I don't think the record shows you have been an attorney in Los Angeles for quite some number of years, have you not?

A. "Since 1902.

Q. "And specializing in corporation matters?

A. "No; in general practice.

Q. "You have done considerable corporate practice, have you not?

A. "Quite a good deal.

Q. "And, as part of that, you necessarily have been presented with numerous tax problems?

A. "Yes; I have been presented with them but only the very simplest ones have I tried to advise on.

Q. "You have consulted with other attorneys or tax specialists on anything complicated?

A. "Yes.

(Narrative Testimony of Eugene Overton)

Q. "And you have done that throughout your practice, have you?"

A. "That is correct.

Q. "And also in the management of your business of the Marlborough (T. 174-175) [25] Corporation?"

A. "No; I have never had any advice as to those matters that I recall. I never paid much attention to the tax angle on the Marlborough Corporation. Price, Waterhouse made out the return always and at times I discussed matters with them. Usually I took what they said, however, and what they wrote out. Once we thought we had been overcharged, that is, the Marlborough Corporation, and I employed Mr. Kumler's firm in that case to appeal to the Board of Tax Appeals and the decision was our way in that. It was about \$1,500 as I recall. I think that is the only time I consulted outside counsel on tax matters for the Corporation.

Q. "However, you were hiring at all times during the taxable years in question and immediately preceding that time the firm of Price, Waterhouse, certified public accountants?"

A. "We started with Price, Waterhouse, as I recall, not for tax purposes at all but at the time the lease was entered into with Miss Blake. The lease provided that the books should be audited by Price, Waterhouse, or some other reputable firm, twice a year and that, I think, was the inception of it.

Q. "That was in 1925?"

A. "I think it was; yes.

Q. "Did Price, Waterhouse from that date thereafter also serve as accountants for the corporation as well as

(Narrative Testimony of Eugene Overton)

for the school, differentiating between the corporation and the operating business?

A. "Here is the way that was handled by Price, Waterhouse, or the way I asked them to handle it and the way it was provided in the lease, that the school was to be handled, so far as the accounting went, as a separate department of the corporation. In other words, the reason for that was this, that the rental under the lease was a fixed amount and a percentage of the profits of the school. Therefore, it was necessary that the accounts or that the audits should be in two divisions, one, the school operation, so as to know what the school profits were, or losses, and the other the amount of the corporation itself. Does that make it clear to you? I think it is all set out in the lease, if you have read it. (T. 176-177.) [26]

Q. "Yes; I have.

A. "Does that make it clear to your Honor?

The Court: "I would say I don't think it fully answers the question. Will you read the question, Mr. Reporter?

(Question read by the reporter.)

A. "They did serve not as accountants but as auditors for both the school and the corporation.

Mr. Bryant: "Is that sufficient?

The Court: "Yes.

Q. By Mr. Bryant: "Directing your attention to the claim for refund filed in this matter, are you familiar with that document?

A. "No; I can't say I am. That was prepared by Mr. Kumler and I remember reading it over and signing it but I don't think I have seen it since.

(Narrative Testimony of Eugene Overton)

Q. "Did you prepare or furnish to Mr. Kumler the figures for the minimum working capital requirements as of August 31, 1939, and August 31, 1940, as set forth therein?

A. "I don't remember, Mr. Bryant.

Mr. Kumler: "You had better show it to the witness.

Mr. Bryant: "I will.

Q. "Do you wish to see this photostatic copy, which is my copy?

A. "What is your question directed to?

Q. "To this part.

A. "Your question is did I furnish the items shown here?

Q. "Yes.

A. "Total, \$22,300?

Q. "That is right.

A. "No; I don't think I did.

Q. "Do you know who furnished those?

A. "I presume it was furnished by Mrs. Marsden, who was the financial vice-principal of the school. I presume she did.

Q. "You signed the claim for refund?

A. "I think I did; yes. (T. 177-178.) [27]

Mr. Bryant: "May I have Exhibits E and F, which are the two claims for refund filed by the corporation?

Q. "I show you the front page of Exhibit E and ask you if that is your signature or a photostatic copy of your signature appearing thereon.

A. "Yes; I think so.

Q. "And also upon the document Exhibit F?

A. "I think so.

(Narrative Testimony of Eugene Overton)

Q. "The 'Marlborough Corporation, by Eugene Overton, President'?"

A. "I think so.

Q. "Those figures were prepared as a part of this claim for refund which you signed and you did see it and examine it?"

A. "I remember that I read and saw that claim for refund that was prepared, I believe, by Mr. Kumler in his office.

Q. "Leaving with you Exhibit E and directing your attention to page 12 thereof, the minimum working capital requirements as at August 31, 1939, and August 31, 1940, which you duplicated upon the same page in Exhibit F, I will ask you to examine those figures.

A. "Yes.

Q. "Did those working capital requirements, amounting to \$22,300, set forth on that page, represent your best judgment as of the time the claim was verified, as to the operating and working capital?"

A. "Yes and no. It is headed 'Minimum Working Capital Requirements' and these items cover what I assume to be the estimated expenses of running the school during the summer months.

Mr. Kumler: "I think, if the court please, I will object to that question unless it also contains the statement on the preceding page that this is an estimate. I don't think the question completely states the fact unless it includes that statement.

The Court: "Perhaps the matter can be covered by redirect examination. The question in its present form doesn't seem to be open criticism.

(Narrative Testimony of Eugene Overton)

A. "This covers items that are pretty much the same every year, I think, for instance, advertising catalog, accounting, stationery, public relations man (T. 178-180), [28] annual salary, repairs and maintenance, and various items of that kind that are recurring each year. What was that question again, Mr. Reporter?

(Question read by reporter.)

A. "I will say yes insofar as the regular recurring items of expense every year but not insofar as any extraordinary or unforeseen expenses that might come up.

Q. By Mr. Bryant: "During the years 1939 and 1940, did you have any such expenses?

A. "We were not paying the school expenses at that time. That was being paid by Miss Blake and I don't know.

Q. "You had no such expenses, then, until the termination of the lease with Miss Blake on August 31, 1942?

A. "Yes; excepting that the lease was terminated. Your statement is correct, I think, excepting that the lease was terminated actually on June 12th or 13th, by mutual agreement, 1942.

Q. "Did you, in 1939, anticipate—

The Court: "Wait. Let me hear that answer again.

A. "The lease by its terms was terminable or to expire August 31, 1942, but, by mutual arrangement with Miss Blake, it was agreed that the actual termination should take place either June 12th or 15th, 1942, the reason for it being so that we could take over and make the necessary repairs, renovations, and all of those things, during the summer months.

(Narrative Testimony of Eugene Overton)

Q. By Mr. Bryant: "In 1939, did you anticipate any change in the terms of the lease in respect to the termination date thereof?

A. "I had a great deal of discussion and correspondence with Miss Blake for some years before the lease was actually terminated. Now I would have to go back and review my records to answer that question with any accuracy. I have a lot of that stuff here, if you want me to go over it.

Q. "Do you have that here with you?

A. "I have a practically complete file on the lease and its modification and so on.

Mr. Bryant: "I think the answer to that question is sufficiently (T. 180-181) [29] important to the government's case that the witness should be allowed to refresh his recollection from his records.

The Court: "Very well; you may look at your file.

A. "I am sorry, but that will take some little time.

The Court: "I think we will take a recess and I will ask counsel to advise the court when Mr. Overton has completed his examination.

Mr. Bryant: "We will be glad to do that.

(Short recess.)

A. "May I have that last question again that Mr. Bryant asked me?

(Question read by reporter.)

A. "I will try to answer that more in this way, Mr. Bryant—

Q. "Will you, first, please, Mr. Overton, answer it yes or no if you can? If you can't, so state and then explain your answer.

A. "No; I don't think I can answer it yes or no for this reason, that the lease by its terms was to terminate

(Narrative Testimony of Eugene Overton)

August 31, 1942. Now, it would have been extremely awkward for both the lessee and the lessor to have had it terminated at that time for the reason that the school term ends in June, about the middle of June. From that time on is the time that the renovations and all the summer expenses and repairs and so forth are made and new teachers are employed and enrollments of pupils for the next year come in. And that is not an undertaking that the lessee would want, or Miss Blake would have wanted, nor would we have wanted her to do it. In other words, the logical time to terminate the lease, which I didn't realize when I drew the lease years before, was the end of the school term and not the end of the fiscal year. Therefore, we anticipated because, had Miss Blake gone on to the end of August, she would have paid all of those summer expenses but, by terminating in June, as we did, the corporation had to pay them and the corporation made, or Mrs. Overton in this case, made all repairs, employed the new teachers and all the things getting ready for next year and enrolled the new students. We anticipated and hoped at that time that, if and when the lease was terminated, it would be terminated as of the end of the school term.

Q. "You considered that? (T. 181-183.) [30]

A. "Oh, undoubtedly. I remember very well discussing it with Mrs. Overton. It must have been about that time—I couldn't say whether it was 1938, 1939 or 1940 or maybe before—I remember saying to her, 'I made a mistake when I drew a lease and provided for termination at the end of the fiscal year instead of the school year.' So I am quite sure that was contemplated. Legally, Miss Blake had to hold it until the end of August.

(Narrative Testimony of Eugene Overton)

Q. "And, also, under her agreement, she had the duty to renovate and repair for the next school year?

A. "Yes.

Q. "In other words, any change you made of the nature you described here would have been a financial detriment to the corporation and a benefit to Miss Blake?

A. "It would have been a financial detriment to the corporation in that it had to pay those expenses but it would have been more than offset by having the management and enrollments. That would have been an extremely awkward position for the corporation.

Q. "The corporation could have hired their teachers through the coming years?

A. "I think you will find that would be absolutely impractical. If Miss Blake had still continued handling that school, things would have been in a mess. Mrs. Overton can explain that better than I can but I know it.

Q. "You have stated on direct examination that you conducted an investigation relative to the resident situation—

A. "Pardon me; I wanted to give you something else from these records. I found that, in 1939, there was no particular discussion or controversy or anything. There was quite a controversy with Miss Blake in 1940. She wanted some very material concessions in rent and so forth, which were made in part, but the situation was not such that we at that moment had the right to terminate the lease had we wanted to.

Q. "It was actually in your fiscal year ending August 31, 1940, that you changed the terms relative to sharing in profits and fixed rental?

(Narrative Testimony of Eugene Overton)

A. "Yes; we made at that time very material concessions. I have (T. 183-184) [31] that here.

Q. "And this argument with Miss Blake didn't reach any serious point until during the fiscal year ending August 31, 1940, did it, especially in regard to her maintenance of the school and the grounds and the painting?

A. "I don't understand your question.

Q. "Your serious difficulties with Miss Blake, that compelled you, in your judgment, to realize that you were to operate that school, arose during your fiscal year ending August 31, 1940, did they not?

A. "No. I don't know where you get that idea, Mr. Bryant. All through the years that Miss Blake was there, we had many, many discussions and much correspondence as to changes and concessions that Miss Blake wanted, and many of which we conceded. Now, in 1940, there was another one of those occurrences but we had no serious difficulty at that time. We had a little, as I recall—we got a little acrimonious but nothing serious and it was not until, I think it was, very early in 1942 that we definitely, or maybe earlier at the end of the preceding year, decided to terminate the lease. Mrs. Overton and I had been wavering for several years.

Q. "When Miss Blake requested that you waive your share in the profits and that you accept a reduced fixed rental,—

A. "And we did it.

Q. "—you had a rather considerable debate at the time, did you not?

A. "Yes; and that is all shown by the correspondence. But I don't think that was in answer to your question.

(Narrative Testimony of Eugene Overton)

Q. "Not the former one; no. During the fiscal year ending August, 1940, you had actually received factors which later tended to make you terminate this lease, is that correct?

A. "No; that is not correct. Pardon me for contradicting you that way. But the fact that Miss Blake wanted concessions, financial concessions, isn't what interested us so much. It was always our idea, and was then and still is, to try to have that school perpetuated as a very high grade school. Frankly, the financial end or remuneration was secondary. And had—I don't quite like to say this because we always have been very careful in what we said— (T. 184-186) [32] but had we felt that Miss Blake would continue to run that school as we thought it ought to have been run, we would have made a very substantial concession. So that was not the main consideration. Our whole aim during the years has been to try to perpetuate that school in the standards that it was run by Mrs. Overton's mother.

Q. "You conducted an examination as to the relative areas from which your pupils were drawn, did you not?

A. "Yes.

Q. "During those years the corporation was not operating the school?

A. "Not operating it actually. It was only supervising or had a supervisory control.

Q. "Did you investigate the various locations from which your pupils came?

A. "When do you mean?

Q. "During the taxable years.

A. "All the taxable years?

(Narrative Testimony of Eugene Overton)

Q. "1939 and 1940.

A. "I don't remember. I had Mrs. Overton have a map made, one that is for the purpose of sticking pins in, a map of the whole area around here, for one year. I forget which year that was.

Q. "That was in 1943, was it not, Mr. Overton?

A. "For the year 1943?

Q. "That was in the year 1943, was it not, that was first made?

A. "I don't remember what year it was made in or what year it represented.

Q. "Is it a matter of fact from your studies that your attendance from Pasadena, San Marino, and San Gabriel Valley increased while the attendance from intermediate points decreased, that is, those portions east of the school?

A. "That I can't answer. I made this study just recently. I don't know whether that is an exhibit or not. Is that in evidence?

Q. "That is an exhibit to the stipulation.

A. "I did this. I got from the school a roster of the students for (T. 186-187) [33] each year beginning with 1922. Isn't it in the stipulation?

Mr. Kumler: "1923.

A. "That was as far back as their records were accurate. That had the names and addresses of the girls in most cases. That tabulation is not, your Honor, an absolutely accurate tabulation for this reason. Some of the addresses were missing and they could not be found, a very few, particularly a few in the early years. In those years there were boarding pupils. Those I did not include in the tabulation because they might come from New York or any place else. They didn't figure in what

(Narrative Testimony of Eugene Overton)

we were studying. And then I omitted those who were living on Rossmore Avenue, and there were quite a few, because that was the dividing line. Then I went through most of them myself and put in blue or red pencil where I knew the streets, "E" or "W," for east and west. Those that I didn't know I gave to my secretary who had a large map of this area and had her mark "E" and "W" as to those where I didn't personally know the streets, and from that we tabulated the number year by year that were east and the number year by year that were west.

Q. "And isn't it a matter of fact, Mr. Overton, that the pupils of the Marlborough School could be located in bunches? If we put pins in the map for their home residences, would you have clusters of pins in various areas?"

A. "That may be so; I don't know. I didn't make that kind of a study. I can say this, that, in making those lists, I noticed that the tabulations—let me look at that tabulation. Take the latter years—have you seen this, your Honor?"

Mr. Bryant: "It is Stipulation No. 2, your Honor, page 3.

The Court: "Stipulation 2, what page?"

Mr. Bryant: "Page 3, your Honor, 'Marlborough Population Trend, Day Students.' This excludes the boarding students that were resident at the school.

A. "In 1923, for the school year 1923-1924, there were 260 pupils living east of Rossmore and 74 living west of Rossmore. Going on down, there is a rather definite trend and a rather consistent one to the westward.

(Narrative Testimony of Eugene Overton)

Q. "Yes, Mr. Overton.

A. "In 1930-1931, you will note that it is about even; that it is a (T. 187-189) [34] hundred each way.

Q. "I am trying to save the time of the court in regard to this. We have stipulated that your books would show that which is set forth on your trend. But what I want to know is, to explain this stipulation, do you have groups of pupils, in other words, the corporation? Isn't it a fact that the school is surrounded by the residences of the pupils and the majority of them are even today within a radius of a few blocks, with a cluster of Beverly Hills, a cluster in Westwood or West Los Angeles, and a small cluster in Pasadena and in the San Gabriel Valley and a few in the San Fernando Valley?

A. "If you say that is a fact, I will accept your statement. It would sound reasonable. I don't know and I don't remember what that pin map showed but it does seem to me that it did show some clusters.

Q. "Your tabulation took no account of those clusters?

A. "No account of those clusters. We were not interested in that and we are not today. What we are interested in is the general shift west and whether or not, to meet that shift, we have got to move the school.

Q. "Your pupils come from the class with more means than the average, do they not?

A. "On the whole, I think that is so; yes.

Q. "And the ultra—I shouldn't say 'ultra'—are so-called upper middle class?

A. "I wouldn't want to classify them but they come from the generally well-to-do class.

Q. "And those persons as a rule live in selected areas?

(Narrative Testimony of Eugene Overton)

A. "That is correct.

Q. "Among those families there is usually transportation facilities available, is there not, except during the period of rationing and national emergency and so forth?

A. "I haven't followed that angle. I think Mrs. Overton knows more about how the girls get to school than I do. I do know that during the wartime it was quite a job for a lot of them. I have heard Mrs. Overton discuss it.

Q. "You are willing to agree, however, that the automobile has (T. 189-190) [35] facilitated the attendance of your day pupils?

A. "Yes; I notice that the automobile congestion here is awfully bad.

Q. "In 1939, did you consult any engineers or architects in regard to the cost of replacing the main building?

A. "No.

Q. "Did you in any year prior thereto, since 1934?

A. "No; not directly, Mr. Bryant, as to the school. I think I generally keep myself informed as to the general trend of expense, that is, whether building costs are higher than they were or lower than they were and so on. I talk with contractors a great deal and I very often question them on those things. So I think I was generally informed. Or I will put it this way. I knew that for a good many years the building costs had been increasing very materially. For example, I remember I discussed that quite at length with Mr. Bill Simpson, of the William Simpson Construction Company, whom I see at lunch quite often, and people like that; but as to a definite study with reference to the extra cost to Marlborough, no.

(Narrative Testimony of Eugene Overton)

Q. "You arrived at no definite sum, within a thousand or so dollars, that would be necessary for the cost of replacing or remodeling your buildings?"

A. "No.

Q. "Your plan was not sufficiently definite to enable you to do that?"

A. "No.

Q. "In regard to your loss due to earthquake, you have estimated that to be the sum of \$20,000 for one year in one of the policy memos which you have introduced. How did you arrive at that sum?"

A. "You might call it a guess on my part or an estimate.

Q. "As to your estimate in regard to operating expenses, as it was prepared on November 7, 1939, how did you arrive at that?"

A. "Which item is that?"

Q. "I believe that is Exhibit 2.

A. "I think I have testified as to all of that. To run the school during the year, during the summer months, costs twenty to twenty-five thousand, and then the balance was for renovations and replacements that would have to be (T. 190-192) [36] made and all of those things. I think I went into that quite fully yesterday.

Q. "In arriving at that figure, did you include therein the cost of teachers, salaries for teachers and salaries for employees?"

A. "For the summer months; yes.

Mr. Kumler: "Which figure is that, Mr. Bryant?"

Mr. Bryant: "The \$50,000.

A. "The operating cost of twenty to twenty-five thousand is for the actual operating of the school during those

(Narrative Testimony of Eugene Overton)

months. In other words, the pretty well known expenses would include certain teachers' salaries that were kept during the summer, permanent ones, and things of that kind.

* * * * *

"We filed tax returns for the corporation, myself and my wife for the taxable years in question. Defendant's Exhibit D, the corporation's tax return for 1940 was prepared by Price, Waterhouse. I do not recall the question asked in the return regarding ownership of the stock. (T. 193.) It is correct, as the answer in the return states, that Eugene Overton, owned 50 per cent of the stock and that I acquired it in 1927. A couple of my partners held shares of record to permit them to act as directors. But those shares actually belonged to Mrs. Overton or me. The statement is true that the two of us owned 50 per cent [each] of the shares. I don't know if I stated that I owned the stock beneficially. (T. 194.) If such inquiry were propounded for the year referred to in that exhibit my answer would be that no one has any beneficial interest in the stock but Mrs. Overton and myself. I did not own the stock as trustee. Nor for Mark Overton. I own that as my separate property under the agreement of 1923. (T. 195.)

"You stated that stock was acquired by me in 1927. Yesterday the court called my attention to the fact that I had stated that the agreement was made between Mrs. Overton and myself in 1923, and Mrs. Caswell didn't die until 1925, at which time Mrs. Overton inherited the stock, and the two dates didn't jibe. I said that some time later I came into possession of that stock. You have just called

(Narrative Testimony of Eugene Overton)

my attention to the fact or stated it was 1927. That was to carry out the agreement that Mrs. Overton and I made in 1923 to divide everything equally. At that time I had some oil interests that were my separate property (T. 193-196) [37] and I gave her half of it. And later she conveyed a half to me, and then the other things we had were divided equally in that way.

"The reserve fund we were trying to build up was maintained either in cash, bonds or stocks. (T. 196.)

"During the year 1939 the business of the corporation was to own, control and eventually operate if it became necessary, as it did, the school. As to what the corporation did: As president I had conferences with Miss Blake during 1939 and 1940 and years prior and subsequent. I supervised the investments in stocks and bonds, and so forth, to a certain extent and discussed things generally with Mrs. Overton and probably had some correspondence in connection with other matters and supervised the financial matters and answered the questions of the auditors and a lot of things of that kind.

The Court: "May I interrupt here to say it is not clear to me what was involved in that part of the business of the corporation which you conducted either with Miss Blake or anyone else connected with the school. Can you tell us a little bit more about the nature of your activities in that regard?

A. "Do you mean with relation to Miss Blake?

The Court: "With relation to the school. You said you had conferences from time to time with Miss Blake?

A. "Yes.

The Court: "Now, can you tell us something more about the nature of those conferences, what they had to do with the school business?

(Narrative Testimony of Eugene Overton)

A. "Yes; I can, your Honor, to some extent. So far as the financial matters connected with the school or connected with her lease were concerned, those were under, you might say, my direct supervision. I discussed them and had many conferences and much correspondence with Miss Blake in connection with them. She would come to my office quite frequently and I went out to see her occasionally to go over her financial operations; and many times she wanted either her rent reduced or her salary that she was allowed to draw increased, and I handled all of those matters. I am trying to touch this generally. I have, as I say, a mass of correspondence on that and can go into detail if your Honor wishes any more. As to the academic end of it, the policy as to school matters (T. 197-198) [38] that came up, I let Mrs. Overton handle it with Miss Blake. Miss Blake has quite frequently come to our house for dinner and discussed matters. I was usually there at those conferences. But, if any academic question was involved, I sidestepped it or left it to Mrs. Overton. Questions of policy were discussed between the three of us on numerous instances or occasions. Miss Blake would want to do this or that, and I think in most cases we approved but in a few cases we did not.

"In running through this correspondence just now, as an illustration, I found a pencil memo that I made back a good many years ago as to a conference with Miss Blake.

Q. By Mr. Bryant: "During the taxable year of 1938?

A. "No.

Q. "I think you should limit yourself to that.

(Narrative Testimony of Eugene Overton)

The Court: "I am inclined to suggest that that perhaps would be inaccurate because let us assume, merely for the purpose of this discussion, that in the taxable years 1935, 1936, and 1937 the corporation actually operated the school in every sense of the term, and during the fiscal years 1939 and 1940, because of a policy to give the lessee another chance to see if she would conform, no such considerable activities took place. I would be inclined to rule that both sets of circumstances should be considered by the court. And, therefore, I think the portion of the testimony to which the witness is about to refer would be admissible.

A. "This is a pencil memorandum I made on November 20, 1931, headed 'Memos to Conference with Miss Blake.' November 20, 1931, I had a conference with Miss Blake, at my office, relative to the financial condition at the school and probable deficit for this year 1931-1932. We discussed reducing salaries and rent. I advised reducing all salaries by an horizontal percentage cut and said that we would make an equivalent reduction in rent but that we would like to have a modification of the lease, giving us the privilege of terminating it on a six months' or a year's notice. I gave to her reasons that we were not entirely convinced that the goodwill of the school was being maintained by her; that we hear much criticism and that, though we feel that where there is so much (T. 198-200) [39] smoke, there must be some fire, we are not convinced that the decrease in attendance is due to falling off in goodwill; that we are not sure the boarding department should be maintained. I told her that the only definite complaint we had to make was we did not feel she had complied with the provision in the lease as to

(Narrative Testimony of Eugene Overton)

having a competent vice-principal; that we had no present intention of terminating the lease but desired to be in a position to do so if we did find it necessary. Miss Blake agreed verbally to this modification of the lease and, as she was leaving, said she would like the privilege of doing the same. I said, "That is only fair." It has my initials, "E. O." I have stated that as illustrative of some types of talks I had with her. That was not carried out, by the way, that is, as to having the privilege of terminating the lease on six months' notice. She decided not to do that. The financial condition at that time was quite bad.

The Court: "Can you locate either any memoranda or correspondence relating to some period later than 1931-1932?"

A. "Yes; I think so, your Honor. We had a modification of the lease dated the 28th of March, 1933. At that time Mr. James A. Gibson was advising Miss Blake. I have some correspondence from him.

The Court: "Does that relate to anything other than the matter of rental or does it cover the subject matter of salaries and other expenses involved in the operation of the school itself?"

A. "It is rather long, your Honor. It involved a change in the rental terms or the proportion of the profits that she was to pay, which involved she pay the corporation 50 per cent and thus changed it to 50-50; that is, she took 50 and the corporation took 50. Well, wait a minute. Pardon me, your Honor.

The Court: "I was more interested in any correspondence or other documents that have to do with something other than the rent to be paid by the lessee.

A. "This gave her a right of renewal for five years and provided for a certain budget that she should prepare.

(Narrative Testimony of Eugene Overton)

The Court: "What is that about a budget?

A. "On some date subsequent to the opening of the school in 1935-1936, but not later than the 10th day of October, 1935, Messrs. Price, Waterhouse & Company (T. 200-201), [40] or some other firm of accountants satisfactory to the lessor and the lessee, usually prepared a budget of income and expenses for the full school year beginning September 1, 1935. "The income from tuition shall be based upon the number of pupils, both boarding and day pupils, shown by the records to be enrolled at the commencement of the school year 1935-1936, at the then prevailing rates. All other items of income and expenses shall be based upon the statement of income and expenses prepared from the records, verified by the firm of accountants, for the school year ending August 31, 1935, adjusted to allow for necessary increases or decreases in accordance with the information then available and the requirements of the usual operation of the school. A copy of said budget shall be furnished to the lessor and the lessee and, if the budget reveals that the operation of the school will permit the payment to the lessor of the fixed rental provided by Article IV of said lease (excepting the payment to the lessor of any profit from the operation of said school), without the school standing any of the loss from operation, then at any time, on or before the 10th day of November, 1935, the lessee, being in possession and not in default of said lease, shall, at her option, during the said period have the right to renew this lease for an additional term of not less than five years from the 1st of September, 1935, but not longer than to September 1, 1945, on the same terms and conditions as provided in the said lease and supplemental agree-

(Narrative Testimony of Eugene Overton)

ments thereto, excepting that she shall be obligated to pay to the lessor, during the period for which this lease is renewed, 50 per cent of the net profits of said school for each fiscal year instead of the varying percentages referred to in Paragraph V." Then she shall have the right to take up herself the remaining 50 per cent. 'If said budget reveals that the operation of said school will result in a loss for the school year 1935-1936, after the payment to the lessor of the fixed rental provided by paragraph IV of said lease (exclusive of the payment to the lessor of any other profit through the operation of said school), then the right of the lessee to renew said lease for the additional term shall be subject to the right of the lessor at any time during said extended term to cancel and terminate said lease upon giving to the lessee written notice thereof on or before the 1st day of March of any year; such cancellation and termination to be (T. 201-203) [41] effective 30 days after the close of the then current school year.' That is the end of that paragraph, your Honor, in that portion. I don't know whether that is what you want or not.

The Court: "During the subsequent years, that is to say, subsequent to the making of that modification in the lease, was the practice followed of having a budget submitted by the fall of each year and having the same studied and considered by either yourself or Mrs. Overton or both of you?

A. "I can't say that that practice was followed. I can say that Miss Blake would come to me, at more or less frequent intervals, with a budget that she had prepared as to her operations or as to prospective returns and so forth and go over it with me. Now, there was no

(Narrative Testimony of Eugene Overton)

stated time; it was no definite time; but I know it was done quite frequently.

Q. "During each of the subsequent years?

A. "I would think so, your Honor. My records wouldn't show that but I would say there wasn't a year passed but I didn't go into those things with Miss Blake.

The Court: "Do I understand that your files also include some correspondence with the school relating to one or more matters pertaining to the operation of the school? In other words, what did you write to her about and what did she write to you about, if there was any correspondence?

A. "There was a great deal of correspondence. Most of it was with reference to the financial situation, quite voluminous on that.

Q. When you say "the financial situation," what do you include? Something more than rents?

A. "Practically all of it, your Honor, was, although there may have been some exceptions to it, because Miss Blake was seeking a reduction in rent or an increase in her share of the profits or because she felt that salaries should be changed. You see, in the lease we had provided or we wanted the standard of salaries maintained. We had provided there should be no change, either a decrease or increase in salaries without our approval. In two or three instances that came up. I think there is correspondence on that. I am quite sure there is. I know I had a number of conferences with her. One of (T. 203-205) [42] them is evidenced by that memorandum and also subsequent to that. During the years after the crash of 1929 and for a number of years, Miss Blake was having a rather hard time financially. So she took up

(Narrative Testimony of Eugene Overton)

all of those things with me and I approved or disapproved. As a matter of fact, I think in almost all instances I approved.

The Court: "I didn't mean to take the witness away from counsel but we have gotten into a phase of the testimony that I felt should be at least clarified and I tried to do that, I hope, to the satisfaction of counsel. At least I think I understand the situation better.

A. "I remember now one other incident that occurred at my home with reference to the operation of the school. Miss Blake—

The Court: "Do you recall about when this occurred?

A. "My best recollection would be about seven or eight years ago; I am not sure of that. Miss Blake came to the house one night and she wanted to use the school property during the summer months for some purpose other than strictly for girls' school purposes or school purposes, for something that she had in mind. I think it was of a more or less public nature, meetings or something of that sort. And I told her that she couldn't do it. There were a great many things of that general character that I do not remember the details of. The reason I told her she couldn't do it was because the restrictions wouldn't permit.

The Court: "Proceed.

"The school itself has been operated at its present location since 1916. It has built up quite a reputation among people particularly in Windsor Square, so that a great number of people send their children to the school. Its scholastic standards are considered very high. (T. 206.) The business has a substantial goodwill. I have never considered the value of the goodwill of the school and corporation, as such, in dollars and cents, in the event of a

(Narrative Testimony of Eugene Overton)

sale of the school. I would not attempt to put a value on goodwill on a thing of this kind. I don't believe in setting up goodwill on a corporation's books particularly in a business that is personal and subject to being defeated by poor management and the personalities involved. The goodwill of a school (T. 206-207) [43] depends entirely on the management at the time. (T. 207.)

Q. "Did you lease the school and put in its goodwill to Miss Blake?

A. "Yes; I suppose the lease would be a lease of the goodwill and the school.

Q. "As a matter of fact, that is called for in your lease, is it not?

A. "I don't remember.

The Court: "Can't we refer to the lease?

Mr. Bryant: "We can, your Honor. However, I have a reason for this.

The Court: "Yes; very well.

Q. By Mr. Bryant: "That goodwill went into the valuation of the rental of the school, did it not?

A. "No. The rental of the school when we approved that original lease—I don't know whether you have the original lease or not that was made by Miss Blake in 1925. Is that the one you are referring to?

Q. "Yes; I have.

A. "That was based solely on what we believed the school, with proper management, would be able to earn.

Mr. Bryant: "This lease is dated September 1, 1935.

A. "The original lease was 1925, I think it was. It was along the same lines and the rental provided for was based on what we knew the school, based on its past record, could earn with good management and no good-

(Narrative Testimony of Eugene Overton)

will as such was charged in taking into consideration the rental. It was its past earnings and the earnings it could continue to make.

Q. "Then, you didn't rent to Miss Blake a going concern?"

A. "Oh, yes; definitely.

Q. "What would you put the value of that going concern as as against the value of the physical structure?"

A. "I never figured it that way. I knew what the school had been doing under Mrs. Caswell's management, financially, and I sat down with Miss Blake, Mrs. Overton and I, and had many conferences. And Mr. Herbert Googe, who represented her at that time, went over those things and determined what would be a fair rental based on past experience. I don't think the question of goodwill (T. 208-209) [44] ever came into it. In that original lease she had an option to purchase and it may be that that lease provides that, upon payment of, I think it was \$25,000 after a certain period of years, she could purchase the school and its goodwill or something of that sort; but, in determining the rental, there was never any discussion of goodwill and the rental was not based on a determination of goodwill in the sense that I think you mean it.

The Court: "May I interrupt here to inquire, not for the purpose of shortening the cross-examination, do you feel that the cross-examination will still be somewhat extensive of Mr. Overton?"

Mr. Bryant: "No, sir.

Q. "Mr. Overton, I will show you a copy of paragraph 9 of the lease, dated September, 1935, option to purchase.

A. "Yes. Shall I read it?"

(Narrative Testimony of Eugene Overton)

Q. "No; just read it to yourself.

Mr. Bryant: "This is page 11 of the Stipulation of Facts No. 3, your Honor.

A. "Yes; I have read it.

Q. "Does that refresh your recollection as to the possible placing of a value at any time upon the goodwill of the school?

A. "No; that just bears out what I said a moment ago, that in the lease I thought there was a provision, and I think the same thing substantially appears in the original lease, that she could purchase the goodwill and so forth of the school upon payment, after a certain time, of a certain amount of money, \$25,000. But your question, as I recall, was as to the fixing of the rental and was that based on goodwill, and that was not.

Q. "It was not considered in fixing the rental?

A. "Not at all.

Q. "And did you ever value the goodwill of the corporation or the school?

A. "On the books?

Q. "No; place a valuation on it.

A. "No; nothing excepting as there stated; and that was just taken (T. 209-211) [45] out of the air so as to make a consideration for the purchase price of the school if she wanted to purchase it. Here was the purpose of that, Mr. Bryant. When we first entered into the lease with her after Mrs. Caswell's death—she, by the way, had been vice-principal under Mrs. Caswell—we came to an agreement with her, afterwards reduced to writing, that she should pay a certain rental. That, as I say, was based on the experience, the financial experience, of the school. Then she wanted the right or maybe we offered the right

(Narrative Testimony of Eugene Overton)

—I don't remember that—to purchase the school after a number of years. My recollection is she wanted the right to purchase the school at any time and we wouldn't give it to her because we wanted to be sure it was being properly run for a number of years before we let it go. But we did finally concede the right to purchase after a number of years, and I put in the provision in the lease that, for an additional payment of \$25,000, which was nominal, she having paid her rent during the previous years, she could purchase the goodwill. And I think the first lease gave her the buildings and furniture. I am not sure about that.

Q. "And this lease also carried the right to purchase the buildings?

A. "Yes; this lease was changed at that time. That provision was different, I think, in that respect and I think that provision was put in by Mr. Gibson.

Q. "I couldn't hear you.

A. "I think there was a provision put in by Mr. Gibson, although I am not sure of it.

Q. "But you never placed on your books and in known figures in this case does the goodwill enter into the policy of the school?

A. "Never.

Q. "You never considered that?

A. "I never had it on the books. There has never been any valuation on the books of the goodwill, or, if it was done, it was done without my knowledge.

Q. "On direct testimony, Mr. Overton, you stated that among the factors that you considered in connection with your fire loss and your earthquake loss was the item of paying teachers and help in the years 1939 and 1940. As

(Narrative Testimony of Eugene Overton)

a matter (T. 211-212) [46] of fact, you had no obligation or duty to pay either the teachers or the help, did you?

A. "I didn't say, if I recall correctly, and, if I did, I didn't mean to say it, that we expected to pay teachers and help in 1939 and 1940. That estimate was made based on the time that we should take over the management of the school, the complete management of the school; that then we would have to pay those things.

Q. "Mr. Overton, you and Mrs. Overton have income besides that which is recovered from the school, have you not?

A. "Yes.

Q. "And that was stated upon your income tax returns for the years 1938, 1939, and 1940?

A. "It must have been. Neither Mrs. Overton or I prepared those returns but I think at that time Mr. Ira Frasier [Frisby], an accountant who specializes in that work, was doing that work for us. He prepared them.

Q. "From the figure which you gave him?

A. "Yes; from our books.

Q. "You have numerous investments and securities, have you not?

A. "Personally, do you mean?

Q. "Yes.

A. "I have some; quite a few.

Q. "Do you have an estimate as to the yield on those investments percentagewise during the taxable years 1938, 1939 and 1940, that is, the calendar years?

A. "No; I couldn't give you that.

Q. "Would you say that you received 5 per cent or 6 per cent or any other figure?

(Narrative Testimony of Eugene Overton)

Mr. Kumler: "If your Honor please, I hardly see how this is within the scope of cross-examination unless counsel can explain what he is directing his questions to.

The Court: "Will you enlighten us?"

Mr. Bryant: "I wish to see the relation between the interest on the (T. 212-214) [47] investments of the Overtons and the return that they made upon their loan to the corporation, that is, the notes that are payable. You remember there is a 7 per cent return on those.

Mr. Kumler: "I still fail to see any connection with the matter in issue in this case, your Honor.

Mr. Bryant: "A part of the issue in this case, your Honor, is the question of a corporate pocketbook and I believe—

The Court: "There may be some basis for argument there. I think I should allow the question. Mr. Reporter, will you read that question again?"

(Question read by reporter.)

The Court: "What amount was invested in securities? Is that your question?"

Mr. Bryant: "That is correct, your Honor.

A. "I can't answer that for this reason: My investments are not made from the standpoint of interest earnings. My investments are made, and, incidentally, I employ and Mrs. Overton employs and the Marlborough Corporation employs, an investment counsellor, Mr. Lee A. Paul. He makes the investments for us more from the standpoint of whether or not the stocks or bonds are liable to increase or decrease in value and the profit or the loss made from that standpoint, hoping, of course, it will be a profit; and the interest is a secondary consideration. Therefore, I haven't paid very much attention to the interest.

(Narrative Testimony of Eugene Overton)

Q. "Do you pay much attention to the yield?"

A. "Do you mean as to whether they make a profit or not?"

Q. "That is right."

A. "No, frankly, I don't. I discuss it with him every now and then. He comes to the office or he calls me up and says, 'No, this is my policy; I think I had better sell this stock and take a loss, and I had better sell that and make a profit,' and gives me his reasons. We discuss the general investment policy. I am speaking now as to my own and the corporation's. I pay no attention to Mrs. Overton's. I don't even know what she has. I couldn't tell you today what stocks he has purchased or sold for me within the last three months. (T. 214-215.) [48] Of course, I have it in my records but I couldn't tell you that."

Q. "Mr. Overton, are you familiar with Schedule E of Defendant's Exhibit D, the corporation income tax return, of which I show you a copy here, listing certain stocks? Are you familiar with those stocks during the taxable year ending August 31, 1940?"

A. "These are, I assume, stocks owned by the corporation at that time. Isn't it?"

Q. "I believe that is true."

A. "That is the purpose for which they were included in that return or the apparent purpose, I should say. You ask me if I am familiar with them. I think I recognize the names of all of those companies and securities."

Q. "Are any of those stocks connected with the business of the Marlborough Corporation?"

A. "How do you mean?"

Q. "Are any of those firms accomplishing the same purpose or doing the same work that the Marlborough

(Narrative Testimony of Eugene Overton)

Corporation is doing? Do those stocks by themselves further the corporate purpose of the Marlborough Corporation except as investments?

A. "No; these stocks are stocks and bonds in the reserve fund that I have been building up and which I and our investment counsellor feel are liquid stocks and good for investment. And the purpose of all this investment is to build up and retain that fund we have been discussing so much.

Q. "They have no connection with the purposes of the corporation?

A. "Do you mean with the operation of the school?

Q. "Yes.

A. "Not with the direct operation of the school.

Q. "Nor with your operation insofar as you are concerned of the school?

A. "Well, only insofar as that, if we need a certain amount of money for any contingencies I have talked about, we can sell these stocks and get the money just as if we carried it in the bank.

Q. "Is that also true as to the bonds and stocks listed upon Schedule C for the year in question? (T. 215-217.) [49]

A. "All of the securities, Mr. Bryant, are for that purpose. Let me say again it is just exactly as if the money were in bank, as a considerable sum is.

Q. "In other words, the corporation was engaged in investing its surplus in stocks of other companies for the purpose of gaining a higher yield than that received from banks?

A. "Yes; and thereby building up the reserve.

Mr. Bryant: "No further questions." (T. 217.) [50]

* * * * *

GEORGIA OVERTON,

a witness for the plaintiff, being first duly sworn, testified as follows:

Direct Examination—Georgia Overton

"I was brought up in the school business from the time I was a baby, and taught at the school for five or six years. Unofficially, in many ways I was vice-principal to my mother. She discussed everything and her plans with me over the whole period she lived. After I was married and lived away from the school, I was here constantly while she was alive, and a great deal after Miss Blake took the school. (T. 241.) It was I who really decided on Miss Blake as principal after my mother died.

"I am now principal. I took over the buildings on the 15th of June 1942, although I had done some things like talking to teachers or employees before the close of the school year.

"Marlborough School enjoys a very good reputation. We send a great many girls to colleges everywhere in the country, and our record with the colleges has been excellent. There is a California association of independent secondary schools, formed about 5 or 6 years ago, by some of the best schools for boys and girls in the State and their constitution provides for a board of standards appointed by the presidents of the different universities. Stanford and California are represented every year. At the beginning there was one other college (T. 242) Pomona. Later there were three other colleges. The other three members served for periods of three, four and five years, so there is a shift of membership or personnel of the other three. Those professors pass upon physical equipment, ethical practices and scholastic

(Narrative Testimony of Georgia Overton)

achievement of the schools and may remove any school from membership on the approved list. Certain schools met to form the association and they couldn't be permanent members until they were passed upon by the board of standards. There were 63 applicants at the time and the board of standards accepted 21.

"Marlborough is rated at the very top. They judge on the record of pupils that the schools recommend to colleges. Their requirement is that 67 per cent of the girls recommended make a "C" average or better in their freshman year, and in the last three years Marlborough's record has been 93 per cent. (T. 243.) [51]

"With the assistance of two of my vice-principals, I supervise the upkeep of the school properties. During 1939 and 1940, while the lease was in effect Miss Blake looked after the condition of the properties. To the extent of my ability, I saw to it that the provisions of the lease were observed by the lessee. As I understood it the corporation had nothing to do with the upkeep of the school other than objecting to expenses. (T. 244.)

"During the taxable year 1939 and 1940, I, after consultation with Mr. Overton, performed the functions of determining what facilities were needed or not needed in connection with the school.

"Based upon indications in the years 1939 and 1940, the condition of the school properties, as compared with (T. 245) normal conditions (T. 245), showed that a good many things were needed. The gymnasium was extremely old-fashioned compared to any school that might have been built at that time and in a good many ways inadequate in the matter of showers and dressing room space.

(Narrative Testimony of Georgia Overton)

And there wasn't any refrigerating plant. In the general school buildings, there was some inadequacy in the size and number of classrooms. The possibility of eliminating the boarding department would have involved quite a great deal of remodeling. (T. 246.) In doing away with the boarding department it was contemplated that we would increase the number of day pupils and that many of the rooms that had been used for the boarding department would be converted into classrooms. Rooms, used as bedrooms, for example, would be converted into classrooms, which in all cases meant taking out partitions and throwing two bedrooms together to make one classroom. (T. 247.) The Junior high school would inevitably be enlarged in case the boarding department was done away with, and it would necessitate enlarging the junior high assembly room as well as making what we call home rooms where each girl has her own desk and keeps her books. Those have to be large enough to contain a certain sized group and it would mean throwing rooms together. That is quite a considerable thing and a good many rooms were involved.

"There are three wings to the building upstairs, the west wing which already had classrooms, the east wing which did not and practically the entire south wing would have to be converted into extra rooms, and throwing some rooms (T. 248) [52] together on the west wing.

"The interior of the rooms would have to be changed completely. It meant putting up black boards. Those rooms had been wall-papered and it meant taking that off and painting them and installing blackboards and linoleum on the floors, if you could get it. (T. 248.)

(Narrative Testimony of Georgia Overton)

"As to extraordinary renovating needs during 1939 and 1940, practically the entire interior of the buildings needed repainting and redecorating and some external painting. A great deal of furniture was old-fashioned and a school has to be kept modern. The fabrics were not faded; they were in good condition, but there should have been new furniture purchased because it was outmoded and the effect was bad. The wallpapers which had been very good when put on had been there too long. They belonged to another era. I do know that the wallpaper in the main halls had been put on by my mother before 1924.

"The carpets were, in general, in good condition. There were some that should have been replaced. They were in bad condition. We have some oriental rugs.

"The drapes were old-fashioned and out-of-date and had been kept when they should have been changed (T. 249), to go with the other changes made. The effect was a very antique decorative scheme; both old-fashioned and patched.

"After we took over the school in 1942 we made all the renovations, repairs and remodeling anticipated in 1939 and 1940, except the refrigerating plant, the kitchen and the remodeling of the gymnasium, neither of which was possible under war conditions.

"The \$35,000 needed for additions to buildings and other facilities at the present location, testified to by Mr. Overton, included mainly, the gymnasium. That is partly sealed, perhaps you would call it a rustic effect, unfinished wood. The rest of it shows the joists, or studding, or whatever they are. And it is completely unfinished. It

(Narrative Testimony of Georgia Overton)

makes it (T. 250) very dark with that color and it is impossible to paint, satisfactorily, the rough wood, that is left. We never did do anything with it and the least that should be done would be to seal the gymnasium and paint it. The shower baths and dressing rooms are inadequate; the shower baths are the original ones put in. (T. 251.) [53] If installed now they would be entirely different. They are rather like tin bathtubs. The dressing rooms are inadequate in that there just isn't room enough. The dressing rooms are used by the girls to change from their uniforms into their gym clothes. They should use lockers, but we haven't the space for lockers for their daytime clothes. (T. 251.)

"The need of space for facilities, which, Mr. Overton testified, was one of the considerations for considering moving the school in 1939 and 1940, including space for two more tennis courts, two more volley ball courts, a soft ball field and a swimming pool. There is no space for any of those on the present property or on contiguous property. We also needed ground for parking space. Some girls drive their own cars and we have no parking space except the driveway. The girls park all up and down Rossmore and that is bad from the traffic standpoint. Then the cars that come for the girls have no place to wait, except in the driveway, with the result that they are obliged to keep moving round and round. If a parent is there in a car and the girl is not immediately available, that car has to move on. (T. 252.) In the years 1939 and 1940, we had complaints on that situation. The driveway was enlarged at one time by taking a section off the lawn, but it was completely inadequate. There have been complaints always.

(Narrative Testimony of Georgia Overton)

“At the time the school was moved in 1916, Mrs. Caswell and I made a study of the population shift and it was one of two factors in our determination to move the school. One was the fact that the school buildings were old-fashioned and somewhat inadequate and the other was the shift in population. At that time the school was, roughly speaking, on the southeast corner of an oblong. She moved it to Third and Rossmore which was on the Northwest corner, on the theory that the population was moving in that direction and would soon go beyond here. (T. 253.)

“At present, less than half the students drive cars to school. Only junior and senior classes are allowed to drive. The others get to school on street cars, buses or are driven by some member of the family. This percentage would stand about the same for the year 1939 and 1940. The element of the distance which parents have to drive their children to school does have an effect (T. 255) [54] on the number of students who will travel. (T. 255.) I can't state whether any pupils came from the San Gabriel Valley because I haven't checked on that. The probability is that none did except as boarding pupils. At present we have only one pupil coming from San Marino. They moved there and the child was so desperate that she drives in from San Marino. And we have one other from Glendale.

“It is difficult to say what effect distance has on the number of students who enroll. If they don't enroll we can't count them. But distance and time enter in because school begins at 8:30 and even if the distance is not too great there are a great many families who don't care to get up early enough to get a daughter started an hour

(Narrative Testimony of Georgia Overton)

ahead of time, after she has breakfasted. So, unless they are determined she shall go to Marlborough, they normally send her someplace nearer.

"I am personally familiar with the details of expenses of operating during the summer months. (T. 256.)

(At this point counsel for the defendant stipulated to the expenses set forth on page 12 of the Claim for Refund for the year ended August 31, 1939, being defendant's Exhibit "E," as being reasonable figures for expenditure for any similar three month period.) (T. 257.)

Cross-Examination—Georgia Overton

By Mr. Bryant:

Q. "Mrs. Overton, during the period of 1939 and 1940, did the corporation have any power to make any additions to the property without the consent of Miss Blake?

A. "Do you mean building?

Q. "Yes; or alterations.

A. "No; or, incidentally, repairs. No; the corporation could have bought land.

Q. "But as to repairs or adding facilities, that could not be done, could it?

A. "No. (T. 257.)

* * * * *

The Court: "May I inquire, would it be either desirable or practicable (T. 258) [55] to outline what we should look for during the inspection of the subject property?

Mr. Bryant: "I think it might be desirable, your Honor. I think the main reason for inspection is, in addition to the testimony of the witnesses, for your

(Narrative Testimony of Georgia Overton)

Honor to have an opportunity to determine the usable value of the buildings to get an opinion as to what the reasonableness of a businessman's opinion would be as to the length of time that those buildings might be used. As Mr. Overton stated on the stand, the fact that a building is full depreciated does not necessarily mean that it can no longer be used; and that, of course, would go into the reasonableness of the plan, in 1939 and 1940, of moving the school and the length of time in which the present buildings could be used. I think that is the only purpose of an inspection of the buildings. There also is that chart out there in regard to population, is there not?

Mr. Kumler: "Yes; there is.

Mr. Bryant: "Which is in the office. It was to bulky to bring to court and we thought, as long as there was a possibility that the court might go there, we could also inspect it at that time, not to be entered as an exhibit but merely for the guidance of the court, since it was prepared subsequent to the taxable years in question. But, however, the group relations would be relatively the same. I think the government is willing to stipulate that there is a trend on this westward development of the class of persons from which the clientele of the school is drawn, or perhaps it might be more accurate to describe it as a dispersement of the groups. If we have a group going to San Fernando Valley and Beverly Hills and Westwood and have another group going east into the San Gabriel Valley and into Pasadena, San Marino and Arcadia and San Benito Village, I think those are facts that the court could even take judicial notice of, things which are so familiar to all the residents of Southern California and especially with your Honor's long number of years here.

(Narrative Testimony of Georgia Overton)

The Court: "May I ask the reporter to read the last sentence in counsel's statement, the long sentence with reference to this population trend chart?

(Record read by reporter.)

The Court: "I am not sure that I grasp the import of your statement (T. 258-259) [56] as to what the court will take judicial notice of.

Mr. Bryant: "The trend in population development of the particular class that the school draws its students from. I think that is something that the court could probably take judicial notice of, and, certainly, a businessman could do so. We have had no argument with counsel in regard to the fact that there is a trend. The extent of it is something we have not introduced proof concerning. (T. 259-260.)

(At this point the hour of visiting the subject premises was agreed upon.)

* * * * *

The Court: "I think that would be desirable. We haven't consulted Mrs. Overton, though.

Mr. Kumler: "I did, your Honor, and she consented. If your Honor please, counsel for plaintiff would like also to have you take particular note of the gymnasium, the shower rooms and the dressing rooms, on your visit, particularly those items. And also your Honor might inquire about the general appearance of the school properties as compared with 1939 and 1940.

Mr. Bryant: "Counsel is willing to stipulate there have been no structural changes since that time.

Mr. Kumler: "There have been remodelings.

Mr. Bryant: "I mean structural changes; that is, the main buildings have not been changed.

(Narrative Testimony of Georgia Overton)

Mr. Kumler: "There have been no additions, to my knowledge, in the floor space, no additional floor space added.

The Court: "Wouldn't it be advisable for someone to point out what changes have been made subsequent to the taxable years?

Mr. Kumler: "I think we will ask Mrs. Overton to do that, with your Honor's permission. (T. 260-261.) [57]

* * * * *

MR. MORGAN ADAMS,

a witness for the Plaintiff, being first duly sworn, testified as follows:

Direct Examination

"I am in the mortgage business. I have been president of the Mortgage Guarantee Company and the Bond Investment Company since 1922 and vice president before that since 1913. I resigned directorship in the Title Insurance Company and Bank of America in 1931 or 2. As a director of the Mortgage Guarantee Company I am responsible for loans made by that company. All loans come to my attention. I have passed on loans of 200 or 300 millions since 1922. (T. 40-41.)

"I was connected with private school business from about 1917 until 1932 or '3 as trustee of Harvard School [for boys in Los Angeles]. I was a trustee of Catalina School for Boys and still am, from about 1926. As an officer and director of loaning institutions I have had occasion to consider and pass on private school loans. It is hard to say how many. Undoubtedly a great many

(Narrative Testimony of Mr. Morgan Adams)

applications for private school loans came to us over a period of years. Almost invariably these applications have been too high for us to consider. (T. 41-42.)

"Some of the applicants were the Girls Collegiate School, Black-Foxe Military Academy, and a school in Brentwood. I have forgotten its name. A great many applications came to us over that long number of years. (T. 42.)

"A school loan not only as a business risk but also as a real estate risk is very dangerous. They fall into the same category as a loan on a church or club. It has something to do, of course, with the background of the school, who is in it; their degree of success; but in general that is looking at it as a cold lending proposition. In the first place, the buildings are entirely one type of building. They can be used for nothing much except school purposes and the nature of the business is dangerous. So I think the general policy of any lending institution would be that the loan be based primarily upon the value of the real estate. While you might give some value to the buildings and some value particularly to the management and success of whoever was running it, yet the loan would be of a very conservative value if you threw in any value on the buildings. (T. 42-43.)

"Leaving out personalities or background and assuming the buildings had little or no value for other purposes, the limitation on the amount loaned would [58] be a conservative amount of the value of the real estate. (T. 43.)

"I think universally the Metropolitan Life Insurance Company, which we have represented for 20 years, won't

(Narrative Testimony of Mr. Morgan Adams)

consider one purpose loans of this type at any price. (T. 44.)

“In my capacity as trustee of private schools I have considered the desirability of borrowing money on behalf of such schools. We were approached in regard to making a loan to Harvard School, but didn’t do it. In 1926 Harvard School decided they would have to move from their then location. They had a comparatively large tract of ground on the corner of Western and Sixteenth about 700 by 700. They conducted not only a day school but also a boarding school. They had various vicissitudes. They purchased, and that was while I was still a trustee but I was away in the service, a very sizable piece of ground to which they expected to move on the corner of Beverly [now Sunset] and Sepulveda, about 20 acres. (T. 44.)

“My recollection is that they paid about \$20,000 an acre for that stuff, around \$400,000. They borrowed, for the purpose of making that loan [purchase], from the Pacific Mutual, around \$375,000 on their old property at Sixteenth and Western. They had a chance to sell that property to one of the big chain stores; the property at Sixteenth and Western. My recollection is that they were offered \$650,000 and the board of trustees turned it down, feeling they would get close to a million. They bought the Westwood property, or the other property, before they had completed the sale of the Harvard School property, feeling sure they were going to get a good price. Either the panic of 1929 hit them or the deal blew, so they couldn’t sell the old Harvard school property. They lost the chance. That is what broke them. They borrowed this large sum of money and they had this

(Narrative Testimony of Mr. Morgan Adams)

large piece of property in Westwood and they lost the chance to sell their property here where they were, and from there on down the Harvard School was nothing except a financial headache. The Pacific Mutual finally foreclosed on that loan, and I think the Pacific Mutual—by the time they foreclosed it was well in excess \$425,000—they sold the Westwood property for around \$50,000; that is, the Pacific Mutual did. (T. 45.) They sold the Harvard School property this year, which was carried all that time for around \$160,000 or \$170,000. In other words the Pacific Mutual took a loss in the neighborhood of \$200,000 on the loan and that was [59] apparently in contemplation of the move Harvard School expected to make. (T. 46.)

“Based on my experience as an executive officer passing on loans made by lending agencies and upon my experience as trustee of two private schools, my opinion from the business viewpoint of the preference of financing the cost of school buildings and facilities out of earnings rather than borrowing is that you had certainly better insure yourself against the necessity of borrowing.” (T. 46.)

Cross-Examination—Mr. Morgan Adams

“The rates of interest prevalent from 1916 to 1925 in regard to school loans, when, as and if granted, would be, say, 7 per cent. No reputable lending company would charge as high as 12 or 15 per cent, neither in 1916 nor 1924. (T. 46-47.)

“In 1939 interest rates were lower. Standard rates on regular run-of-the-mill business in Los Angeles would have been 5 per cent versus 7 per cent in 1916. The rate had not changed in 1940. This was a gradual decline in

(Narrative Testimony of Mr. Morgan Adams)

the rate of interest in Los Angeles over a period of years. (T. 47.) There was no more loaning money available in 1916, 1918, and 1922; just interest rates had changed, mainly due to interest on government borrowings, government bonds having dropped from 4 per cent to 2 per cent to 1 and ½ per cent. (T. 48.)

Mr. Kumler: "If your Honor please, I would like to have counsel clarify whether these questions are with respect to secured or unsecured loans."

Mr. Bryant: "To the type of loan we are talking about here, a school loan, which, presumably, would be secured. I don't think that anyone would probably grant a school loan unsecured, in the usual business."

Q. "Isn't that correct?"

A. "I am not in that business. Ours is the mortgage business."

Q. "You have testified only in relation to mortgage loans? You are not testifying as to any other type of loans?"

A. "I didn't think I would qualify. I am, primarily, a mortgage man."

Mr. Bryant: "That is all the questions I have." (T. 48.)

Redirect Examination—Mr. Morgan Adams

"The loans to which I referred in my testimony were all secured by first trust deeds on income and producing real estate. (T. 48.) [60]

"The opinion I express with reference to the preference for financing facilities out of earnings rather than out of borrowings would apply to any particular period of time as well as 1939 and 1940. [61]

* * * * *

JOHN C. AUSTIN,

a witness for the Plaintiff, being first duly sworn, testified as follows:

"I am an architect. I am not a graduate of any college or university. I followed apprenticeship courses and have no honorary degrees. (T. 49.)

(At this point counsel for the Defendant stipulated Mr. Austin's qualifications as an architect and estimating architect and that he had built a great many schools and similar buildings in the Los Angeles area.) (T. 50.)

"I have had occasion to consider the cost of construction of school-type buildings in 1939 and 1940; am familiar with such costs, and keep records of such costs. There was no substantial difference between the type of construction used in public and private school buildings in 1939 and 1940. (T. 50.)

"I am familiar with the buildings of Marlborough School at Third and Rossmore in Los Angeles. I designed and supervised construction of the Main building, Building No. 1, and the Music building, Building No. 2. The Music building is a combination auditorium, music building, and other things, classrooms and so forth. (T. 51.)

"I recently examined the plans and have been over the buildings at Marlborough.

"Based upon my experience and knowledge of school buildings and my knowledge of the size and character of the Main building at Marlborough, Building No. 1, it is my opinion that to replace it, about August 31, 1939, with a building of similar size and containing substantially the same facilities, you would not be allowed to build the Marlborough School as it was originally built. It was a

(Narrative Testimony of John C. Austin)

three-story building in part and a two-story in other parts. It was a frame building, and the laws so changed that in 1939 one would have to build a masonry building and the minimum type of construction in that year would have been masonry walls and fireproof corridors. You could have used wood in the construction of the roof and the floor joists to span the classrooms. If it were a three-story building, which Marlborough is, it would have to be absolutely fireproof or a Class A building. If it were a two-story building, you could have built it on the Class B type, which I have just described, and the cost would be very little different. A building of the same square footage or floor space, built three stories, just as the building [62] is at present, with the same general facilities as to classrooms, partitions, plumbing, and all those things necessary to a building, but under the conditions existing at August 31, 1939, comprising 48,058 square feet, would cost, in my judgment, \$5.31 per square foot, amounting to \$255,188. There would be practically no difference in such cost of replacement as of August 31, 1940, as distinguished from August 31, 1939. (T. 51-53.)

“Based upon my experience and knowledge of building costs and my knowledge of the size and character of Building No. 2, the auditorium [music] building, containing 14,182 square feet, it is my opinion that it would cost, on August 31, 1939, \$5.31 per square foot or \$75,306 to replace it by a building of similar size and character and containing substantially the same facilities, in the light of costs and conditions then existing. When built in 1927, it cost \$4.92 per square foot.” (T. 54-55.)

The Court: “May I interrupt just a moment? May I interrupt to ask a question here to see if I understand

(Narrative Testimony of John C. Austin)

this testimony? You have given us a figure of \$75,000 plus as the approximate cost for building the auditorium in 1939 as against a cost of \$69,000 plus for the year 1927. In giving us those figures, have you assumed that, in 1939, the building would be constructed exactly as it was in 1927 with respect to materials and the like?"

The Witness: "Yes, sir; it could have been constructed in 1939 almost exactly as it was constructed in 1927. We had built it of reinforced concrete and it was almost a fireproof building. That is why the cost is so different."

Q. By Mr. Kumler: "That is the auditorium you have reference to?"

A. "The auditorium. The actual cost was \$69,000 and I estimated it would be \$75,000 plus in the years later."

The Court: "Then, referring to the figures that you have given us with reference to the three-story building, I understand it was built in 1916 and is frame-constructed?"

A. "Yes, sir. Every bit of it would have to be torn down and replaced with something else."

The Court: "And this figure of \$255,000 plus as the cost, in August, 1939, would represent a Class A building, having a like size and facilities?" [63]

The Witness: "Exactly, according to the conditions and costs as they existed at that time."

Q. By Mr. Kumler: "Mr. Austin, you stated that the cost of the main building, No. 1, would be approximately \$255,188. Does that include the pergolas and terraces that went into the original main building?"

A. "No, sir; that was just the main building itself."

(Narrative Testimony of John C. Austin)

Q. "What was the cost of those other items, the pergolas and the terraces, originally?"

A. "That I don't remember and my records don't reveal it. I don't know whether they were part and parcel of the original cost of \$77,185 or not, but to reproduce them I have an idea as to how much that would cost."

Q. "Could you express an opinion as to the amount?"

A. "About \$14,000."

Cross-Examination—John C. Austin

"There is no equipment included in my estimate on the main buildings. I figured on the building; no lockers, no floor coverings and no electric light fixtures. Plumbing would be included as part of the building. Electrical fixtures were not in [the estimate] but the wiring would be in, including all outlets ready to attach the fixtures to." (T. 56.) [64]

* * * * *

THOMPSON WEBB,

a witness for the Plaintiff, being first duly sworn, testified as follows:

"I am headmaster and half-owner of Webb School at Claremont. As headmaster I enroll the boys, look after the discipline and attend to the business. I am entirely in charge of financial affairs. One hundred twenty-five students are enrolled; a few in eighth grade but most in the four years of high school.

"For years I have been a trustee of Scripps College and on the Board of the California Junior Republic, which is something of a school as well as a home. (T. 57.) I was

(Narrative Testimony of Thompson Webb)

one-time president. I am a trustee of Webb School, my father's school in Tennessee, and a director of Pomona Hospital. I was for some years a director of the Los Angeles County Mutual Fire Insurance Company.

"I have been an owner and headmaster of Webb School of California since 1922. I was born and reared in my father's school at Bellbuckle, Tennessee. It was founded by my father originally, and my oldest brother operates it now. My father prepared more Rhodes scholars than any other American teacher, I was told by Dr. Aidelotte, who is head of the Rhodes Foundation in America, and Dr. Pennypacker, the Adams officer of Harvard University. There is a chart, carefully worked out, in his office (T. 58) of the standing of every school based on the academic standing of its pupils. Father's school was No. 1 and had the highest rating. In the writings of Woodrow Wilson you will find that he makes this statement about the record of father's school at Princeton University.

"I taught in the Webb School of Tennessee for years. I was summer school head for nine years and for four years was their bookkeeper. I am now a trustee.

"In 1922 my father's teachers were coming back from the war and I wasn't needed there. I was \$20,000 in debt, and I wasn't going to pull out by taking a salary in school and I had to do something. An opportunity came to buy a school in Claremont, California. They quoted a price of \$40,000, half cash. I negotiated with them until they cut the price to \$25,000 on the original 20 acres (T. 59) and the buildings and let me take it over for nothing. I was to pay for it out of earnings. That was in 1922.

(Narrative Testimony of Thompson Webb)

"I had no capital to start with, and \$20,000 indebtedness. I financed my expenses of operation from 1922 to 1930 by borrowing. (T. 57-59) [65]

"We now have 65 acres and 20-odd buildings and more than 40 employees.

"In the last few years we have entered in a team [competition] formed by the American Chemical Society, which is an examination. We have taken the first place in three years, including last June. We have taken second place twice and third place twice. Last year we entered a boy in the Westinghouse Competition offering a scholarship amounting to \$1,850 to the Carnegie Technical (T. 60) Institution of Pittsburgh. There were 690-odd contestants from 44 states, and our boy won one of the ten scholarships. At the end of the semester our boy had the highest record of the ten admitted. Six times we have entered the competitive competition for the Harvard National Scholarship and five times we have won, giving us the largest standing of any school of the West.

"Our school at Claremont was financed by borrowing and living out of profits. The borrowings were all paid on time; principal and interest never defaulted. (T. 61.) In financing the acquisition of land, buildings and equipment the funds required are gotten from borrowing or accumulations of earnings. In my experience as an operator of a school, paying as you go is the sounder [method]. It is much safer.

"My father advised me strongly against borrowing. He told me he had never seen a school that borrowed that didn't go broke, and yet I had to borrow and I fought through that line. But I don't know of another

(Narrative Testimony of Thompson Webb)

institution that has been able to survive and do it. It is much sounder business to acquire capital and then spend it rather than borrowing.

"I am familiar with the practice of schools in funding (T. 62) depreciation recoveries on school buildings and facilities. The American Council of Education, in Washington City, have issued a pamphlet called 'Financial Advisory Service of the American Society of Education.' Our school belongs in an honorary capacity. They point out that public institutions do not depreciate real estate; that they are not for profit and there is no purpose in depreciating them and that many eleemosynary institutions, depending entirely on funds, do not depreciate. But they make this point: 'The importance of maintaining inviolate the principle [principal] of the permanent funds represented by real property makes provision for renewals and replacements an essential part of the proper management of these funds.' (T. 60-62.) [66]

"If depreciation on any type of real property is taken, it should be represented by cash or investments earmarked and specifically set aside in replacement, or depreciation, funds.

"If depreciation is not funded, the sole purpose of providing for it in education institutions is defeated.

That is from the body of it. Their final conclusion is, "If it is expected that this property will be replaced out of the income of the activities, it is essential that depreciation be accounted for.

"If depreciation is taken, it should be funded, that is, cash should be set aside in replacement, or depreciation funds."

(Narrative Testimony of Thompson Webb)

The Court: "May I interrupt to inquire when that pamphlet was issued?"

The Witness: "In November, 1935."

The Court: "And have you kept sufficiently informed on the subject to be able to tell us whether or not there has been any modification of that statement?"

The Witness: "I have not seen any, sir."

The Court: "May I see it just a moment, please?"

The Witness: "I could get all of the bulletins, if you like."

The Court: "For the purpose of the record, will you tell us what is the American Council on Education, and something about its constituent membership?"

The Witness: "I don't remember when it was founded but I have heard it referred to for many years. It is composed of the universities and colleges of the United States. It was founded to assist them in every possible way and to keep them informed and to issue bulletins of importance. They employ experts in various fields and issue pamphlets which are useful to the educational institutions. It has only been in the last year or two that they have invited a few private schools to membership and it was considered quite an honor to be one of those invited."

The Court: "Of course, I haven't had time to read this bulletin but I notice it uses expressions like these on page 1, for example, the opening sentence: 'The problem of depreciation of buildings and equipment in educational institutions is one that gives considerable concern from time to business managers and financial officers.' And the next sentence is, 'Newly elected board members and (T. 63-65) [67] public officials quite frequently are greatly troubled by the fact that the institutions under their con-

(Narrative Testimony of Thompson Webb)

trol do not depreciate their plant assets as do all well-regulated commercial enterprises, and set about developing elaborate schedules of depreciation rates and directions for their application.' ”

Mr. Kumler: “Would it be of any help to your Honor if we offered that in evidence?”

The Court: “Just a minute; I may have a question. Or perhaps you can save me a little time. I am tempted to ask this question because of the expression that I attempted to emphasize: Does this bulletin or pamphlet undertake to point out in any further language a distinction between a public and a privately-owned school on the one hand, and a school which is conducted as a commercial enterprise?”

The Witness: “I think they do. I have read that with care several times. They recommend very strongly that the public institutions, the State-owned institutions and the eleemosynary institutions, carry their worth on their books always at the cost price, but they make the point on portions of property which they have, that are operated for commercial purposes, that they be depreciated. While they don't mention private schools as such, the inference is that, where you are operating commercially, you are required to depreciate, and I think your summary may give you that, which is a complete summary here of all the arguments that have been given.”

The Court: “Do I understand this might be left here at least as an exhibit for identification and then later it may be determined whether it shall go into the record in its entirety?”

Mr. Kumler: “If it will be helpful to the court, yes.”

(Narrative Testimony of Thompson Webb)

The Court: "Suppose you read the conclusion in its entirety."

The Witness: "The following principles applicable to educational institutions may be drawn from this discussion of depreciation:

"1. Educational institutions will find little or no benefit from the annual computation of, and accounting for, depreciation on their educational property.

"2. Depreciation should be accounted for on property used by the auxiliary enterprises and activities in order that the total cost of operating these activities may be known, and as an aid in determining rates of fees and other charges. (T. 65-67.) [68] If it is expected that this property will be replaced out of the income of the activities, it is essential that depreciation be accounted for.

"3. Institutions should account for depreciation on property held as the assets of endowment funds in order to maintain the principal of the funds.

"4. If depreciation is taken, it should be funded, that is, cash should be set aside in replacement, or depreciation funds.

"5. Three purposes may be served by the calculation of depreciation on educational plant, namely, determination of insurance values of property and equipment, determination of the true costs of instruction, and determination of the minimum amount that should be appropriated each year for replacement.

"6. Information on depreciation necessary for these three purposes should be recorded in subsidiary or supplementary records, and not as a part of the regular accounting procedure.' "

(Narrative Testimony of Thompson Webb)

The Court: "I have no other questions."

Q. By Mr. Kumler: "Mr. Webb,—"

Mr. Bryant: "Pardon me; I am going to move to strike all of the answers of the witness relating to depreciation on the ground they are immaterial to the present case. Depreciation was taken and has been taken at all times by this corporation. If we originally had a question of obsolescence and depreciation, that has been eliminated. I don't see the purpose of the present testimony."

Mr. Kumler: "Your Honor, it has been charged that the corporation had a large quantity of cash and securities around which it didn't need in its business. This authority to which Mr. Webb has referred here states that it is a justifiable business purpose to set aside in a replacement fund cash or investments, and that is what we want to show. If it is not germane to this issue, I don't see what is."

The Court: "It isn't clear to me just what is implied in the objection of government counsel."

Mr. Bryant: "I don't think depreciation has been taken by the parties in this case and there has been no argument in regard to it that I know of."

Mr. Kumler: "We were asking the question of financing replacement, how it should be done, and what is a reasonable way to do it."

The Court: "Let me see if we are talking about the same proposition. Are (T. 67-68) [69] you talking about the bookkeeping or are you talking about the setting up of any tangible form of the cash or the cash equivalent to provide against this depreciation?"

(Narrative Testimony of Thompson Webb)

Mr. Bryant: "I understood from the witness' testimony that he was speaking about their bookkeeping accounts. I may have misunderstood what he was trying to get at."

The Court: "As I understand that bulletin,—"

Mr. Bryant: "I haven't had an opportunity to inspect that bulletin."

The Court: "No; I don't think you did, and we want to be mindful, of course, of that. The bulletin will be marked as Plaintiff's Exhibit No. 3 for identification."

Mr. Bryant: "I understand that the purpose of the question is that the depreciation should be funded. Of course, with that understanding, the evidence would be material in this case and I would withdraw my objection based upon that."

The Court: "Yes."

Q. By Mr. Kumler: "Mr. Webb, I previously asked you to examine the facts set forth in Stipulations numbered 1, 2, and 3, which are in the record in this case. Have you done so?"

A. "Yes, sir."

Q. "Are you familiar with the balance sheets and profit and loss statements appearing in those stipulations and the other facts with respect to the plaintiff corporation?"

A. "I have read them a number of times."

Q. "Mr. Webb, assuming that, on August 31, 1939, the corporation, having the financial history set forth in the Stipulations 1, 2 and 3, was leasing its properties, including its name and goodwill, to a third party, who was actually conducting the school operation but whose lease would expire on August 31, 1942, and assuming,

(Narrative Testimony of Thompson Webb)

further, that the management of such a corporation, on August 31, 1939, was considering the possibility of not renewing that lease but of resuming complete conduct of the school business, and that the management of such a corporation had to have on hand sufficient working capital to resume the conduct of such business; and assume, further, that, as of August 31, 1939, it was a fact that the cost of replacing such corporation's main school building would exceed, by some \$150,000, the (T. 58-70) [70] original cost of such building; and assuming, further, it was a fact that such corporation needed to expend in excess of \$20,000 for extraordinary repairs and renewals at the expiration of the lease; and assuming, further, the shifts in population from which the school drew its students, as well as the limited amount of space available for the addition of facilities at the school, presented the management with the possibility of having to move the school, and that in such event the amount which could be realized from the sale of the land and buildings from its then location could not be expected to exceed \$75,000; assuming, further, that it is true that lending agencies do not consider school properties as good lending security; and assuming that the net earnings, after income taxes for the year ended August 31, 1939, were \$39,971.56, and that from such earnings dividends amounting to \$17,500 were paid to stockholders; assuming the facts to which I have referred to be true, have you an opinion, based on your knowledge and experience in the private school business, as to whether the excess of the earnings over the dividends paid, if accumulated by the corporation, would be within the reasonable needs of its business?"

A. "Yes; I have."

(Narrative Testimony of Thompson Webb)

Mr. Bryant: "I am not sure that I understand the question, if your Honor please."

The Court: "Would you like to have the reporter read it?"

Mr. Bryant: "Yes; I would."

The Court: "Or do you have it written out there so counsel can follow it?"

Mr. Kumler: "Yes; I do."

Q. "Have you an opinion, Mr. Webb, as to whether or not the excess of the earnings over the dividends paid would be within the reasonable needs of the business if accumulated by such a corporation?"

A. "Yes; I do."

Q. "What is your opinion?"

A. "I feel that it is very reasonable that they keep that to meet future needs. In fact, it seems to me imperative."

Q. "Mr. Webb, assuming all of the facts in the question which I just asked you were true, except the possibility of having to remove the school was so remote (T. 70-72) [71] as to be of little consequence, in your opinion, would that difference under the circumstances alter your previous opinion?"

A. "Not at all."

Q. "Now, Mr. Webb, I have another taxable year here. Assuming that, as of August 31, 1940, the corporation, having the financial history set forth in Stipulations Nos. 1, 2, and 3, was leasing its properties to a third party, including its name and goodwill, which third party was actually conducting the school business but whose lease would expire on August 31, 1942; and assuming, further, that the management of such a corporation, on August 31, 1940, was planning not to renew such

(Narrative Testimony of Thompson Webb)

lease but to resume complete conduct of the school business, and that the management of such a corporation had to have on hand sufficient working capital to resume the conduct of such business; and assume, further, that, as of August 31, 1940, it was a fact that the cost of replacing such corporation's main school buildings would exceed, by the sum of \$150,000, the original cost of such buildings; and assuming, further, that it was a fact that such corporation needed to expend in excess of \$20,000 in extraordinary repairs and renovations at the expiration of the lease in August, 1942; and, further, that it was true that shifts in population from which the school drew its students, as well as the limited amount of space available for the addition of facilities to the school, presented the management with the possibility of having to move the school at some future date, and that in such event the amount which could be realized from the sale of the land and the buildings at the then location could not reasonably be expected to exceed \$75,000; and assuming, further, that it was true that lending agencies did not consider school properties good security for loans; assume, further, that the net earnings, after income taxes for the year ended August 31, 1940, were \$22,829.13, and that from such earnings dividends, amounting to \$2500, were paid to the stockholders; assuming the facts to which I have referred to be true, have you an opinion, Mr. Webb, based on your knowledge and experience in the private school business, as to whether the excess of the earnings over the dividends paid, if accumulated by the corporation, would be within the reasonable needs of its business?"

A. "I have."

(Narrative Testimony of Thompson Webb)

Q. "What is your opinion?" (T. 72-73.) [72]

A. "I think it is very reasonable that they accumulate those assets to meet future needs."

Q. "Assuming, again, all of the facts in the second question I asked you are true except that the possibility of having to move the school might be so remote as to be of no consequence, in your opinion, would that condition under the circumstances alter your opinion?"

A. "No; I think it is very necessary to remain where they are before that accumulation. They would need it more if they had to move."

Cross-Examination—Thompson Webb

(At this point counsel for defendant reserved the right to move to strike the hypothetical questions, if the facts assumed in the questions were not established by the record, in the light of the fact that the witness was called out of order.)

Q. By Mr. Bryant: "Mr. Webb, did you study over this question prior to the time you heard it in court?"

A. "Yes Sir." (T. 74.)

"From my experience with a school of approximately 200 students supplying a normal high school instruction it is my opinion that the working capital requirements necessary for the average functions of such a school would vary tremendously. I have never studied it from a day school basis because mine is a boarding school. But I had to have about \$23,000 this summer for a boarding school, where the school provides board and room. That includes no clothing. The students buy their clothing in town.

(Narrative Testimony of Thompson Webb)

"The factors that go to make up a day school's operating capital include keeping the grounds in order; a number of skilled workmen painting and repairing." (T. 75.)

Q. "I don't think you understood my question. I mean as of the start of the school year. In this particular case, August 31st was the termination of the operator's lease. The school year would begin immediately thereafter; would it not?"

A. "Yes."

Q. "How much capital would you need to start, as of September 1st, for your new year operations?"

A. "I don't quite know how to answer that." (T. 76.) [73]

Q. "Have you had any experience along that line?"

A. "Well, our fiscal year ends August 31st and we start the new year September 1st."

Q. "Do you count against the operations of the new year the costs of the past fiscal year?"

A. "Well, no. You have to have a point where you divide, but your operations move steadily over that."

Q. "Suppose you had owned school properties, that you had leased those properties for a number of years to an operator who provided her own working capital, and, as of September 1st of a year, you would start operations of a school, she having operated under her lease up to August 31 of the year. How much working capital would you, in your opinion, need for this case of the school operation?"

A. "I would feel a lot safer if I had \$50,000."

(Narrative Testimony of Thompson Webb)

Q. "And for what purpose?"

A. "You don't know when you start this new management whether you are going to have a full school or not. You have to maintain your full staff and employ them in advance, and you may get tuition enough or may not."

Q. "I assume that you have a full enrollment."

A. "You would probably need \$25,000 if the enrollment was full."

Q. "And for what purposes?"

A. "To clean, paint and restore the place."

Q. "Have you examined the Marlborough School?"

A. "Yes."

Q. "How much would it cost to make summer renovations?"

A. "Probably eight or ten thousand dollars just to paint and clean and not to restore or get new furniture."

Q. "And that is the usual summer cleaning?"

A. "It would be with me and I think their plant is equivalent to mine."

Q. "Their buildings are the same as yours?"

Mr. Kumler: "I think, if your Honor please, the record is contrary to that. The record shows that there are two buildings at the plaintiff's school and some 20 buildings at the school of the witness. I wouldn't want a question to be based on (T. 76-77) [74] that assumption."

Mr. Bryant: "Your Honor, there seems to be quite a discrepancy between the two schools."

(Narrative Testimony of Thompson Webb)

The Witness: "They have two large buildings and they [we] have several small ones. There isn't a great deal of difference in the enrollment. They are a little larger than we are."

Q. "In facilities as well?"

A. "Possibly so. They are centered in a city block while we are scattered over a hillside."

Q. "Besides painting, what else would you have to spend money for?"

A. "Repairing, plumbing, school desks, chairs, rugs, and light fixtures."

Q. "How much do those things run you per year per item?"

A. "I don't know per item but we spend approximately \$10,000 a year in repairing our place."

Q. "Just over your full year?"

A. "Yes; and most of that is done in the summer."

Q. "That would be generally prior, then, to August 31st of each year?"

A. "Yes; part of it and part of it afterwards. We always try to get it before August 31st but they are still doing it now and the workmen promised to be through with it by September 1st." (T. 78.)

"I have read Stipulations 1 and 2. I have not read the lease attached to Stipulation No. 3. I didn't consider that as part of my answers to questions asked." (T. 78-79.)

"In answering the questions [hypothetical] I knew that the date on which the corporation was to commence operation of the school year was about two years later.

(Narrative Testimony of Thompson Webb)

"I don't know how much to allocate to earthquake insurance. I have never taken any.

"As an operator of a school I would carry a reserve in my surplus for the purpose of a reserve against fire losses not covered by insurance. I haven't carried any until recently, but it was reckless financing.

"Some schools by keeping to a budget can pay back loans but most of them have gone broke. I have kept within my budget. [75]

"All I know of the financial operations of the Marlborough School is what I have seen in the stipulations.

"I have known the Overton family over 15 or 20 years in the school business. (T. 80.)

"Except for my answer to the hypothetical question a school doesn't borrow money if it can get it some other way. That is true of most businesses."

The Court: "In view of that last answer, may I ask you, Mr. Webb, do you think or at least have you an opinion as to whether or not there is any greater risk on the part of a private school than an ordinary commercial enterprise in undertaking to finance their loans?"

The Witness: "Well, I think it is because the record shows that the greatest casualties in any type of business in the world are in private schools. That is why your loan companies don't want to lend them any money."

The Court: "I have no further questions."

Mr. Kumler: "That is all, Mr. Webb." [76]

* * * * *

HUGH L. MANN,

a witness for plaintiff, being duly sworn, testified as follows:

Direct Examination—Hugh L. Mann

"My profession is real estate broker and real estate investments. I have been engaged in the real estate business since 1916; since 1921 in Los Angeles. I specialize in income property; some homes. From 1923 to 1927 I was sales manager for the W. M. Garland Company. Since then I have had my own business. (T. 82.)

"I have had experience with special purpose properties such as country clubs and private schools; specialty buildings would include theatre buildings.

"In 1937 I made a deal on the Brentwood Country Club and sold their entire holdings. Shortly after the sale I had charge of the property with the idea of making two private schools there, one out of the old club house, which at that time was under lease as a private school, and one out of the new club house. I went to a great deal of effort trying to sell those two improved properties out as private schools. (T. 83.)

"I didn't have any success trying to sell the property for school purposes. Eventually we tore the old club building down and sold off the lease.

"Generally speaking there is no ready market for the specialty properties to which I have referred. It is almost impossible to sell school properties. The reason is that it is a very hazardous business. In advertising extensively I had a few answers to the ads. Those people who answered I interviewed. They were invariably someone with school experience but no money. (T. 84.)

"I tried to sell the Collegiate School for Girls, down at Glendora, for the Citizens National Bank after they fore-

(Narrative Testimony of Hugh L. Mann)

closed on it. I did not succeed. I couldn't find anyone with any money to handle the deal.

"In my experience as a real estate broker, I know that the Harvard School which was foreclosed by the Pacific Mutual Life Insurance Company, has been on the market for many, many years.

"As an underestimate I would say I have sold 300 or 400 pieces of property in Los Angeles since 1921. (T. 85.) [77]

"I have personally examined the land and buildings at Marlborough School at the corner of Third and Rossmore. (T. 85.) I have an opinion as to the fair market value of the land and buildings of the Marlborough School as of August 31, 1939, in the light of then existing conditions. In advance of giving an opinion may I explain that due to the restrictions I have got a determining factor there. The land is actually the principal value. The total fair market value of the land and buildings is \$67,865. (T. 86.)

"I am familiar with the deed restrictions. They expire in 1950. I took that into account in reaching my valuation.

"I would say that as of August 31, 1940 the situation had not changed materially with respect to the fair market value of the same property.

Cross-Examination—Hugh L. Mann

"I found a value of \$67,865 for 1939, and the same figure for 1940. I didn't assume a purchaser ready, willing (T. 87) and able to buy; it would be a question of trying to find one. I used sales of property more in character as a basis for these valuations. I told you

(Narrative Testimony of Hugh L. Mann)

that I had not sold any schools. I simply made the efforts and lots of them. I heard the gentleman on the stand here state that Harvard or the Pacific Mutual, rather had finally sold their plot of ground which I know has been on the market for about 10 years or more.

"The entire area adjacent to Marlborough School is R-1 zone. The particular plot that Marlborough is on, I understand it, falls in a special zone. There is R-1, -2 and -3, but I don't think anything fits there except R-1. (T. 88.)

"I didn't investigate with the Planning Commission to determine the zone, or whether there had been any variances or exceptions. I just know that the deed restrictions expire in 1950. I did not investigate that with the Planning Commission. I live so near the school, and have for 20 years, that I happen to know from common knowledge the situation that exists there. I know about a zoning ordinance that permits the school at that particular plot. Of course the buildings are 30 years old and I have had some experience myself that at any time you start to rehabilitate an old building where a building ordinance is passed they prohibit the rebuilding of them unless they are fireproof. It would be either very expensive or impossible. (T. 89.) [78]

Q. "Did you check any of the variances granted in relation to construction during the years 1927 and 1931?

A. "No; I haven't.

Q. "Do you know whether any were granted?

A. "Only through hearsay.

Q. "You made no investigation as to that?

A. "No.

(Narrative Testimony of Hugh L. Mann)

Q. "You made no investigation then, I judge, as to what the factors involving that school are except for common knowledge in the vicinity?"

A. "Yes.

Q. "And your opinion is based upon those figures?"

A. "And the surrounding values providing the property had to be sold back into residential properties.

Q. "And your estimate is based upon the fact that the school property would have to be sold back to R-1 use?"

A. "Do you mean rezoned?"

Q. "No; not rezoned but re-used under the provision of R-1 zones.

A. "If it should be continued or—do you mean past 1950 as a school?"

Q. "Have you examined the deed provisions that expire in 1950?"

A. "I haven't read it; no.

Q. "Have you examined the ordinances in relation to the particular plot?"

A. "No.

Q. "You don't know, then, what restrictions there are against or favoring the particular property?"

A. "As I understand, the original deed restrictions from Mr. G. Allen Hancock permitted use of the private school there until 1950, at which time it will no doubt all come up and nobody knows then what is going to happen.

Q. "Then, it is your opinion that the school will no longer be able to operate in 1950?"

A. "They possibly might.

(Narrative Testimony of Hugh L. Mann)

Q. "They would have to get permission from the Zoning Commission?

A. "Yes; plus the Building Department, which possibly would call for the rebuilding of the buildings there to make them fireproof.

Q. "Are you familiar with the laws and regulations regarding zoning ordinances?

A. "Zoning ordinances?

Q. "Yes.

A. "Somewhat.

Q. "Are you familiar with the laws regarding non-conforming uses? (T. 90-91.) [79]

A. "I have had some falls on non-conformed buildings and, when you start to spend some money on them, you get into a lot of grief.

Q. "Have you made any investigation or do you know anything about the law regarding the use of non-conforming buildings?

A. "Any time that you start remodeling one of them past a certain per cent of its original cost or duplication cost, you have to go back to the existing laws at the present time.

Q. "Is there any possibility of gaining a variance or change here?

A. "I imagine that would fall within the discretion of Mr. Suess.

Q. "And who is Mr. Suess?

A. "He is the man that runs the Planning Commission.

Q. "Is he the zoning commissioner of the City of Los Angeles?

A. "He is everything.

(Narrative Testimony of Hugh L. Mann)

The Court: "What is his official title?"

The Witness: "I believe he runs the Planning Commission, better known as a dictator.

The Court: "For the purpose of the record, will you tell us whether or not he is on the payroll of the city and, if so, in what capacity?"

The Witness: "Yes, he is the head of the Planning Commission.

The Court: "In other words, he is Chairman of the Planning Commission of Los Angeles?"

The Witness: "I suppose that would be his title.

Q. By Mr. Bryant: "Do you know in what zone private schools, except trade, music or physical culture schools, may exist in the city of Los Angeles?"

A. "R-2 and -3, I believe.

Q. "Did you use all of these factors in coming to an opinion as to the fair market value of the premises?"

A. "I did.

Q. "Did you consider the length of time in which the present property could be used?"

A. "I did.

Q. "How much longer, dating from August 31, 1940, do you feel that the (T. 91-93) [80] school could be used in its present location?"

A. "As long as there are buildings existing, I figured it would run until 1950.

Q. "And the reason they couldn't be used beyond 1950 was the deed restriction?"

A. "The deed restriction or else the revamping of the buildings to meet existing fire ordinances or building ordinances.

(Narrative Testimony of Hugh L. Mann)

Q. "In other words, you feel, basing your opinion as to the value of the property, that it would be necessary to revamp or reconstruct the buildings?

A. "I know that the Building Department, any time that you start trying to remodel an obsolete building, especially where you are housing people, which will hold true in theatre or church or any place where there is a volume of people collected under one roof, want you to come back and erect fireproof, non-hazardous buildings.

Q. "Did you consider those factors in coming to your opinion?

A. "I did.

Q. "In the value that you have placed upon the premises?

A. "Yes.

Q. "If I told you that there were no deed restrictions compelling the abandonment of the school in 1950, would your opinion as to the value of the school be changed?

A. "I know a permit will have to be had from the Planning Commission.

Q. "Answer my question, please. Mr. Reporter, will you read the question, please?

(Question read by reporter.)

A. "I don't think that exists, that condition.

The Court: "Let's see if we understand your testimony. Assume that the present buildings did not have to be removed because of any deed restriction in 1950, would your answer as to valuation be the same as you have already given?

The Witness: "Yes; it would, because those buildings are 30 years old now and, in 1950, they will be 40 years old, and they are certainly likely to be put in the class

(Narrative Testimony of Hugh L. Mann)

of a firetrap because they are just frame except the auditorium (T. 93-94), [81] of course.

The Court: "When you speak of the buildings being 40 years old, you are referring to the structures built in 1916?

The Witness: "Yes.

The Court: "And not to the auditorium?

The Witness: "No.

The Court: "Which was built some 18 years ago?

The Witness: "Yes. Of course, it is a much better building. The original building was quite an old building.

Q. By Mr. Bryant: "Assuming, Mr. Mann, that the school location and buildings now used have a less or a more restricted use, would that change your estimate as to the value of those buildings?

A. "More restricted?

Q. "Yes; that is to say, assuming that the school at present is located in an R-3 residential zone, that is, the zone law applicable to buildings; assuming that it could be used for an equivalent use or a less restricted use, such as an apartment house or boarding house, with not more than 12 rooms for rent, a boarding school, a bungalow court, a church, except temporary revival, a college, a convent, a dormitory, a multiple dwelling, an educational institution, public or quasi-public, a fraternity house, a public library, a lodging house, a museum, a non-philanthropic nursery school, a parish house, a rooming house with not more than 12 rooms, a 4-family flat, a triplex, a double dwelling house, a duplex dwelling house, or for a park, would your opinion as to the value be changed if it were usable for those things?

A. "If any one of these types could be built on it?

(Narrative Testimony of Hugh L. Mann)

Q. "Yes.

A. "It certainly would. It would materially affect the value of the property.

Q. "And, if the present buildings or the ground could be used for those purposes, if the ground or the present buildings could be used for any of those purposes, would your opinion as to the value of the buildings be changed? (T. 94-95.) [82]

A. "Yes.

Q. "Under those circumstances, suppose that it was usable as a boarding school or a boarding house, what would be your opinion as to the value?

A. "You couldn't get a firm to open it up as a rooming house, if that were possible, for the reasons I have enumerated heretofore.

Q. "Supposing you could? Supposing you are wrong?

A. "Well, I know it can't be done. If I may state, down on Arden and Lucerne the restrictions expired many years ago, and some groups here in town purchased that property with the idea of erecting apartments and it was thrown back to R-1 and there it is today. And they paid fancy prices for property that is frozen for a long time to come. There are too many millions of dollars of fine homes in all directions for that to happen out there.

Q. "You live right there, do you not?

A. "I do and I happen to know what the existing conditions are.

Q. "Where do you live?

A. "I live at Fourth and Irving Boulevard.

Q. "How far is that from this property?

A. "About six blocks and a half.

(Narrative Testimony of Hugh L. Mann)

Q. "And, if I told you now that it could be used, the Marlborough School, as it is now constituted, that it could be used for a church—

Mr. Kumler: "Do you mean legally, Mr. Bryant?

Mr. Bryant: "Legally.

The Witness: "I wouldn't believe it.

The Court: "You are not being asked as to what may legally be done with the subject property. You have already told us on direct examination your opinion as to the market value of the subject property as of certain dates and in arriving at that opinion you have assumed certain facts and conditions to exist. Now, on cross-examination, you are being asked to assume, not to tell us what the legal status of the property is, but to assume certain other facts, and I think you should direct your answers to the questions thus presented.

The Witness: "Maybe I don't quite understand.

The Court: "Suppose you reframe your question. (T. 95-98.) [83]

Q. By Mr. Bryant: "You have sold other types of buildings besides school buildings, have you not?

A. "Oh, yes.

Q. "And attempted to sell them?

A. "Yes.

Q. "Now, directing your attention to the dates of August 31, 1940, and August 31, 1939, would your answers as to value as to that location be substantially the same as to each year?

A. "Yes.

Q. "Now, assuming that the Marlborough School as it is now constituted could be employed for other purposes besides a school, for the purposes which I have named,

(Narrative Testimony of Hugh L. Mann)

under the law, would your opinion as to the value of the premises be changed?

A. "Sure. I said that a while ago.

Q. "Under those conditions, what would you value the premises for if it were usable as an apartment house?

A. "If you are building apartment houses, residential income—

Q. "No; pardon me; not apartment houses.

A. "On anything that will produce income, it would be worth a great deal more money than in an R-1 zone, R-1, -2 or -3.

Q. "Are you familiar with the types of buildings that are classified within an R-3 zone?

A. "This list that you just enumerated comes within one of those zones, does it not?

Q. "I will show you a document which is prepared by the City of Los Angeles. Mr. Kumler and I have both examined this. Assuming that the present buildings could be used for any purposes within the same class of restrictions or a less restricted use, would your opinion as to value be changed?

The Court: "May I suggest that the question leaves the record somewhat incomplete? You haven't indicated the nature of the document you are showing to the witness. What is that you are showing him?

Mr. Bryant: "It is a list of uses permitted under various zones. My (T. 98-99) [84] opinion is that it has no official standing except as an indication by the Zoning Administrator under his regulations. It is Case No. 121. enacted on November 21, 1941, or a decision rendered on that date, listing the uses permitted in the various zones so that the public may be advised in a con-

(Narrative Testimony of Hugh L. Mann)

cise manner as to the purpose or uses allowed within the restricted zones according to the classifications established.

The Court: "Does the memorandum give the types under each particular zone classification?"

Mr. Bryant: "Yes, your Honor.

The Court: "And under what classification were you reading when you propounded the previous question as to the list of various types of uses?"

Mr. Bryant: "R-3, R-2 and R-1. Class A would be the equivalent of R-1.

The Court: "Will you read the statement of counsel? (Statement read by reporter.)

The Court: "I don't think I understand that answer. Is an R-1 the single family residential zone?"

Mr. Bryant: "The uses that are listed in this item may be maintained in an R-1 zone.

The Court: "I don't understand the use of the expression "Class A." What has that to do with zone R-1?"

Mr. Bryant: "It is not pertinent to this issue. However, there are several Class A zones still left in the city of Los Angeles which have not been classified into R-1, and the reason I used it was the document itself has the "A" designation. If I may see it, perhaps I could explain it to you. It says "R-1," or "A," "Residential Zoning."

The Court: "Will you clear up for me the theory upon which the witness is asked to assume that the subject property may be used for a number of purposes other than those defined under "A-1" or "A, Residential Zoning," and those defined as exempting the ordinance covering the subject property?"

Mr. Bryant: "Your Honor, any non-conforming use may be continued to a less restricted use without request

(Narrative Testimony of Hugh L. Mann)

of a certain variance or any zoning change. (T. 99-101.) [85] An equally restricted use, in other words, use within R-3, may be petitioned for from the Zoning Administrator, who may grant the same without hearing. He grants that upon a showing that the use, the non-conforming use, would be no more obnoxious in its location than the present non-conforming use.

Mr. Kumler: "Mr. Bryant, do you mean the use of the present buildings there?"

Mr. Bryant: "Yes."

Mr. Kumler: "Otherwise, we want to object to the question."

Mr. Bryant: "I will have another question to ask concerning that, covering the buildings."

The Court: "Let me see if I follow counsel. Is this your position, that, under the zoning ordinances of the City of Los Angeles, as of August, 1939, and August, 1940, respectively, a school, musical or classical, a dancing and a trade school, and various other types of properties, could be built in what is defined as C-2, Commercial Zone, and the witness is asked to assume that the subject property, with the present buildings, might be used for any one of the types of improvement which are listed in the category of Zone C-2?"

Mr. Bryant: "No; R-3, your Honor."

The Court: "In other words, the position of government counsel is, in substance, then, that, as of the period or periods in question, the type of school such as that involved in the present lawsuit could be built within what is known as Zone R-3?"

Mr. Bryant: "No, your Honor. That school could be built—yes; that is right."

(Narrative Testimony of Hugh L. Mann)

The Court: "And that, likewise, in that same zone other structures might be built, such as a bungalow court, a library, a lodging house, a rooming house with not more than 12 rooms for rent, and an apartment house? Does that mean having a four-story height limit?"

Mr. Bryant: "No, your Honor. They would have to use the same buildings as they have there now."

The Court: "Will the reporter read my last statement to counsel, I mean beginning with what counsel's position is? (T. 101-102.) [86]"

(Record read by reporter.)

The Court: "Are you asking the witness to assume that, under the zoning ordinances of the City of Los Angeles, the existing improvements might lawfully be employed for such purposes or businesses as an apartment house, a lodging house, a church, excepting a temporary revival, a bungalow court? Would that circumstance affect his opinion as to the value of the subject property as of August, 1939, or August, 1940? Is that the question?"

Mr. Bryant: "That is the question, your Honor; yes."

Mr. Kumler: "If that is the question, your Honor, we must object on the ground that there is not a legal basis for that assumption unless you add to the question the fact that the approval of the director or the zoning administrator be obtained first. If that fact is added to it, then we will withdraw our objection."

The Court: "Will you assume that you have been asked the question that I have last stated, plus the further assumption that a permit can be obtained from the city zoning authorities to use the subject property for one or another of these other uses?"

(Narrative Testimony of Hugh L. Mann)

The Witness: "Does that go back to that hypothetical question a while back? Under the ramifications over at the City Hall, that is a great assumption.

The Court: "You are going to be asked to leave the legal questions alone and whether or not the permit can be obtained is to be eliminated from your thinking, and you are asked to assume an entirely different set of facts. In other words, you are being asked a different hypothetical question, namely, assuming that the existing buildings, as of August, 1939, and as of August, 1940, would be used, as a matter of law, for one or another of these other purposes, would that change your opinion as to the value of the subject property.

The Witness: "It would not change the value, in my opinion. Now, may I explain?

The Court: "Certainly.

The Witness: "When you get into one of these—we call them in the real estate world—white elephants, a building that is built for a special purpose, and you try to revamp it into something for some need, then it falls (T. 102-104) [87] back into this non-conformity building and you had just as well tear them down to the ground and start off with a new building because, by the time—well, I am saying things I shouldn't, I guess. But by the time you get through over at the City Hall, you have to revamp your building, that is, if you get the permit, you have got to revamp that building. I know because I have done it myself and I know what the ramifications are over there. You had just as well tear it down to the foundation. If you get your permit, that is what you will do. I will tell you that.

(Narrative Testimony of Hugh L. Mann)

Q. By Mr. Bryant: "Assuming that you do not have to revamp the building, then what is your opinion as to the value?"

The Court: "Let's see if we understand one another. Does that question mean assuming that, for legal purposes, the building need not be revamped or, for practical use, it need not be revamped?"

Mr. Bryant: "I am assuming for the use contemplated, to use the buildings just as they are or were."

The Witness: "You have got one purpose then for the buildings as is and that is a private school."

Q. By Mr. Bryant: "And you can think of no other purpose?"

A. "Without revamping?"

Q. "For a school."

A. "You have got to revamp them and, when you do that, you get into trouble unless you build new buildings. (T. 104-105.)"

"I figured the value of 562 feet of unimproved ground on which the school was located at \$39,340, on August 31, 1939. It has a frontage on Rossmore starting 150 feet north of Third Street. I figured 562 feet on Rossmore. The basis of that figure is \$70 a front foot which is liberal. I sold 115 feet backing up to the Country Club at the same time for \$8,000. The corner [150 feet on Rossmore at the corner of Third Street], was \$10,000. The restrictions on the other three corners run until 1970. Somebody has already paid more taxes out than they are worth today. My valuation (T. 105) [88] of the Marlborough property fronting on Third Street was \$10,000. (T. 105.) That is an R-1 zone. That is \$66 per front foot. I figured the frontage [of the corner] on Ross-

(Narrative Testimony of Hugh L. Mann)

more is 150 feet. The Third Street frontage is much worse on account of the traffic.

"I have not recently sold any property on Third Street. One property was sold there last week, right east of there, that had been on the market three years. They sold it to a lady that couldn't hear the noise. That property was a corner piece at Third Street and Plymouth. I think the northwest corner.

"I formed an opinion of the salvage value of the present buildings if the school should no longer use them. Very little could be expected to be had out of them. (T. 106.) It might cost money to get them torn down. As of August 31, 1939, I would say \$5,000.

(The \$5,000 figure was a misprint as the witness later testified that the salvage value was \$15,000 which with other values accounts for his total value of \$67,865.)

"My answer for 1940 would be the same.

Q. "In determining the market value of the land and the school buildings as of August 31, 1939, and as of August 31, 1940, if those buildings were used or usable in their present condition for the uses set forth in Zones R-1 and R-2 and R-1-5, that is to say, for four-family flats, triplex dwelling houses, courts, or parks, or something similar, what would you place the market value of that land and improvements?

The Witness: "In other words, you want me to say what the value of that land would be in 1950 if all these things could be done?

Q. By Mr. Bryant: "In 1940.

A. "Well, we know it is a physical impossibility for it to happen before 1950, don't we, due to the deed restrictions?

(Narrative Testimony of Hugh L. Mann)

Te Court: "Have you given that item consideration, Mr. Bryant?"

Mr. Bryant: "Yes, your Honor. The deed restrictions did not require that the school be terminated at the location.

The Court: "Do the deed restrictions permit the other uses in 1939 and 1940? (T. 108-109.) [89]"

Mr. Bryant: "No, your Honor; I don't believe they would.

Mr. Kumler: "The stipulation, I think, shows that they would not permit such use at least until 1950.

Mr. Bryant: "Single family residence except for school purposes—"

Mr. Kumler: "Except for particular school purposes," but that restriction expires in 1950. But our valuation is as of 1939 and 1940.

The Court: "I think it would be clearer, then, if you would rephrase your question so as to indicate that, on the one hand, up to 1950, the subject property could not be used for any such other purposes but that, at the beginning of 1950, the witness is asked to assume that the subject property could be used for one or another of those other purposes. Is that clear to you?"

A. "That is clear.

Mr. Bryant: "I think I will rest on your Honor's statement of the question, if I may.

Q. "Then, what would be your opinion as to value?"

A. "I cannot tell you and any human being in all Kingdom Come cannot tell you because Los Angeles grows and lots of things happen around there, and, to predict what anything is worth 10 years from now, is foolish.

(Narrative Testimony of Hugh L. Mann)

The Court: "Perhaps you didn't understand the question. You were asked to assume you were called say before the board of directors of the Marlborough Corporation in August of 1939 and you were shown the deed restrictions and you were shown the provisions of the zoning ordinances relating to Zones R-1—is that it?

Mr. Bryant: "1 to 5 and R-2 and R-3.

The Court: "And you were asked to appraise the market value of the subject property. In your opinion would you be able to give an opinion to the board of directors at that time?

The Witness: "I would give it the same value as I did a while ago, based on the R-1 residential purposes, and that is the only thing you can do.

Q. By Mr. Bryant: "How did you come to the value of \$67,865?

A. "We didn't figure that up there a while ago. There are 47 feet around there on Third Street that I gave \$3,525 to and 552 feet on Rossmore (T. 109-111) [90] as \$39,340. And I gave \$15,000 to the buildings based on that 10-year period.

Q. "\$15,000?

A. "Yes.

Mr. Bryant: "I think that is all the questions I have. (T. 111.)

Redirect Examination—Hugh L. Mann, by Mr. Kumler

"From my examination of the buildings on the site at the present time they are not suitable for uses for the purposes which counsel [defendant's] as been discussing such as a four-family flat, triplex and so on, without substantial alteration.

(Narrative Testimony of Hugh L. Mann)

"In the event the present buildings are removed from the land or so substantially altered as to cause it to revert to R-1 status my opinion, originally as given would depend on conditions existing in 1950. I wouldn't alter the value as of 1939 and 1940. (T. 111.) I didn't attach any consideration to possible uses which could be made in the future say 10 years hence, assuming the zoning ordinances were different because I happen to know the ramifications. I didn't give that consideration because I know it is impossible. (T. 112.) [91]

* * * * *

Testimony of C. G. Brown.

C. G. BROWN,

a witness for the defendant testified as follows:

Direct Examination—C. G. Brown

"I prepared defendant's Exhibits A and B. The facts stated therein are true to my best knowledge and belief. The appraisals made therein are to the best of my ability in the length of time I had to do it. It is not a finished appraisal in the sense that I wanted. To get down to physical work, if I made a regular appraisal it would take 10 days or two weeks time. I don't think it will [would] vary in amount. (T. 117.)

Cross-Examination—C. G. Brown

Q. "How much time did you take on it, Mr. Brown?

A. "I started, I think Monday and I was in court here—I wanted to hear the testimony of Mr. Austin. I dropped everything else. I have been working on figures. In figuring out, this is quite a bit of calculation to be

(Narrative Testimony of C. G. Brown)

done to get the areas correct, before you start on the question of values. What I mean is it is not a sand-papered parcel dolled up and down to where all the supporting evidence is there. We appraisers have a very definite idea as to the value of a piece of property and then we like to verify it because in that way we keep up-to-date. If we go on our own judgment too long, the first thing we find out is that we go off on a tangent somewhere. So we like to go through the motions of verifying our conclusions on each appraisal. (T. 118.)

"I had an opportunity, in a sense, to verify these figures in the usual manner. I checked with real estate men but this only confirmed my opinions as far as costs were concerned. I am working with these things all the time and I didn't figure it was necessary to verify those, although I put in an hour talking to a builder, Harry Wright, and a half an hour over at the Building Department where we talked unit values.

"The five types of estimates on appraisals shown in defendant's Exhibit B were, you might say, 90 per cent verified at the time I made them because I made them from experience. I am familiar with the district as to land values, and I am familiar with building costs. I was just fixing a soft place to light on because when you answer a number of complicated, involved (T. 118-20) [92] questions like that in a hurry, you might slip up as to some small detail. If you had more time you would not be in error. But I will say that roughly or essentially they are correct and they were verified from past experience. Then I did check with two persons, one of whom is or should be very well qualified. He is with the Building Department. They have to calculate the cost of

(Narrative Testimony of C. G. Brown)

buildings when they assess for items over there. Mr. Wright was a little modest. He has put up millions of dollars worth of buildings but when it came to Class A school buildings he seemed to think I knew more about it than he did. That is Harry Wright, of Harry Wright Construction Company. (T. 118-120.)

"I checked my temporary conclusions as to the market value of land and buildings "as is," in item 5 of defendant's Exhibit B, by talking with Glover, who was formerly an appraiser and is now a salesman with Coldwell Banker. I have considerable confidence in him. I also talked with Mr. Detoy, firm manager of the Wilshire offices. I have appraised some schools, even the Hollywood School for Girls; also the Paige Military Academy, the latter on a condemnation suit and I went into that quite thoroughly. I checked over other schools in town to see what I could find out, to help me make my appraisal of that. That was a property of approximately the same value. I testified, I think, it was worth \$35,000 and I don't think the following six appraisers varied in any material amount from that. That was on San Vicente Boulevard. I assumed its continued use as a school or the highest and best use, which ever you can use it for. That factor must be in the market value.

"I found no records of sales of school property, but did find some negotiations. I didn't have time to get the records. I make appraisals where I go look up a bunch of deeds showing the grantor and grantee and when it was recorded and either myself or I have a man do what we call field work. We find out if it was a sale in the open market and why he wanted to sell and why he wanted to buy and use one sheet of paper for each sale

(Narrative Testimony of C. G. Brown)

and make a record of that. This I didn't have time to do at all. There have been some school sales here. I believe the Harvard Military Academy moved. The Government took it over on a lease. Harvard is in the same fix as the others. (T. 121.) Perhaps they want to get a little further west and need more ground. I didn't examine the Harvard sale with respect to this situation but I did when I appraised the Paige (T. 122) [93] Military Academy. The appraisal of Paige was based primarily on going concern value with land and depreciated value of the buildings. We did give a great deal of weight to the cost of reproduction. (T. 122.)

"In arriving at my appraisal here [Defendant's Exhibit B] I didn't use the same plan as in the Paige appraisal. I knew the cost of reproduction less depreciation. And will say this, that, to find out the market value of that property if the present owner were to give it up and place it on the market—and I assume without any restriction against it being used for school purposes—it would be worth practically nothing. It might not be used for school purposes, but that is just a sort of percolated distillation of my judgment on the thing. The number of purchasers for school purposes is limited, but there is a fine property there. It was designed by an architect that knew his business and the whole thing is a beautiful place for a school to come in if they can get it at a price. I put on these a price at cost less reproduction, less depreciation. There is only one Los Angeles and it is bound to grow (T. 121-122) and a school catering to a class of people like this, they would be glad to get that at a price and this price here is less than half the cost of reproduction, less depreciation and I

(Narrative Testimony of C. G. Brown)

think that would be getting a bargain if they wanted a school. Glover told me he had one school looking for a location at this time. He said they were looking for a plant at \$175,000 and another at \$200,000. I do not know what ones they were looking at and did not ask because I thought he might want to keep that to himself. A religious organization, and I believe that might fit in with a school, can use things like that for training students. Take the Rindge Castle out here. The average appraiser would call it an example of a house in the desert. There was a castle out there on a hillside with nothing else around it. But a Catholic organization bought it for a retreat and they can use it very nicely. As I say, there is only one Los Angeles and it is bound to grow. I try to keep up-to-date and figure out trends, but every once in a while I see something in the paper where somebody has done something that has slipped by me that I hadn't foreseen at all. I wouldn't be a bit surprised, if that school were put on the market and a good salesman like Glover went to work on it he probably could (T. 122-124) [94] turn up three or four schools. Whether or not they would have the money or it would suit them I couldn't say, but I know if I owned it, I would not think for a minute, if I didn't move it, of scrapping it. In fact, it is a possibility they might use two plants within the present one. But I am not an authority on the school business in that way. (T. 122-124.)

Q. "I think it is just as you have stated, a possibility rather remote. Let's leave that out of consideration for the moment. You stated a minute ago that your market value was determined, at least in part, by reconstruction, less depreciation, did you?

(Narrative Testimony of C. G. Brown)

A. "I said I knew what the reproduction cost depreciated was at the time I made an estimate of the market value. Yes; I considered it.

Q. "When you consider reconstruction cost, is that construction under the building codes or in the form the main building now exists?

A. "The way it existed in 1939 and 1940.

Q. "Are you aware that the deed restrictions on that property run until 1950?

A. "Yes and no. It is hearsay with me but I understand that there are other restrictions in there until 1970. I know it in this way, that the deed restrictions are such as to stop much speculation. If people buy a lot in there, they buy it because they want to build a house. That isn't property down on Wilshire Boulevard, where some of the same restrictions are in force. They will buy it down there without knowing why they want it and they will buy it for the purpose of—

Q. "To save time, let us confine ourselves to this locality. I think you stated you were familiar with the fact that the adjacent properties were subject to deed restrictions until 1970. Are you familiar with that fact?

A. "That is my understanding; yes, I have at different times gone into those deed restrictions thoroughly but I didn't take time to verify them on this. I just assumed that that was it because it is general hearsay out there, I believe, that some of them are 1950 and some of them 1970. But the important thing for my purpose is the deed restrictions were in effect to the extent that nobody is going to buy it as a speculation or for any other use than residential. (T. 124-125.) [95]

(Narrative Testimony of C. G. Brown)

O. "In other words, your valuation is arrived at on the assumption that those restrictions are in effect and will continue in effect until 1950 and 1970, respectively?

A. "That is true, except that I very much am aware of the fact that they had zone variance, or whatever it is, there that allowed them to erect these school buildings; and, in case the buildings were up before it was zoned, I figured the buildings could stay there as long as they were so used. That was the situation that arose as far as the zoning restrictions are concerned with respect to the auditorium building at the time it was erected. I mean—

Q. "Now, Mr. Brown, what uses, in arriving at your figures of fair market value here in 1939 and 1940, if any, other than R-1 uses or use as a school building, did you assume this property had?

A. "I assumed it had use only for school purposes or it would have to be something so nearly similar and like school purposes. It would have to be a quasi-school. You couldn't use it for a sanitarium or a hospital or those people would get up in arms there.

Q. "What particular uses did you consider within the category of similar uses?

A. "None such occurred to me. I figured it only as to a school. If I were trying to sell it, I would try to sell it only to somebody who could use it for school purposes.

Q. Do you happen to know whether or not the property on which the Harvard School at 16th and Western,

(Narrative Testimony of C. G. Brown)

or Venice and Western, is situated, is zoned for commercial uses there?

A. "No; but I would be willing to wager a hundred to one that it is at least part on Western Avenue and Venice, too. I have a zoning book and, when I want to know the zone, I simply refer to that and don't try to carry them in my head.

The Court: "May I ask counsel in propounding the last question were you undertaking to call the witness' attention to the fact that the so-called Harvard School, at Western and Venice, eventually was sold at a time when the property was zoned for commercial use? (T. 125-127.) [96]

Mr. Kumler: "That is what I was asking the question for.

The Court: "Did you have that factor in mind when you were undertaking to appraise the subject property?

The Witness: "I think I should say yes. But I paid very little attention, your Honor, to the Harvard School. I just knew that was sold; that the character of the neighborhood had changed and it wasn't used for school purposes any more. And you might say I bore down a little bit in my mind in putting this price on there.

The Court: "Are counsel able to agree on the size of the Harvard School site at Western and Venice Boulevard?

Mr. Bryant: "I am not familiar with the Harvard School, your Honor. I made no investigation with respect to it. It is an entirely different type of school. It is a different type of neighborhood and a different age and different size of ground, I presume. Someone testified it was 700 by 700 if I remember the testimony correctly,

(Narrative Testimony of C. G. Brown)

but I don't see that that is really material except in testing the amount of consideration this witness has given to that. He states that he has given it only slight consideration. And, inasmuch as that sale must have taken effect quite a few years after the taxable years in question, concerning which the witness has testified, I don't see that it is material.

The Witness: "Off the record, I will correct one dimension. While I don't know the exact dimensions, I know it is not 700 by 700. It might be six or seven hundred on Western and it goes one block the other way.

Mr. Bryant: "As I state, I am not familiar with the size excepting the testimony here.

The Court: "Let me add this observation. The thought that prompted my interruption was that yesterday Mr. Morgan Adams, and I am not sure but what also the witness Mr. Mann, called attention to the so-called Harvard School site and the difficulty in disposing of it; that eventually, after it had been foreclosed by the Pacific Mutual Life Insurance Company, the property was sold at quite a substantial loss at a time when the property was rezoned for commercial use. Assuming those facts to be true, I think the Harvard School site (T. 127-128) [97] the witness said was sold for \$150,000 but here, on Exhibit B, I believe the witness has appraised the site of the subject property at \$60,000. Taking into consideration the restrictions that still exist, I am interested in this phase of the cross-examination. It doesn't at least sound convincing to me how the witness arrived at this figure of \$60,250.

Mr. Bryant: "If counsel and I may enter into a stipulation here for the purpose of the record, it may be

(Narrative Testimony of C. G. Brown)

of interest to your Honor. The 1939-40 assessed value of the real estate is \$35,610 and the improvements \$33,220. I am reading from the tax bill, 1939, to the Marlborough School. There is an additional piece of property, unimproved, valued at \$1,700. The two combined would be assessed valuation according to the County Tax Collector's records. Will you stipulate to that?

Mr. Kumler: "I will stipulate the tax bills show that.

The Court: "Of course, in eminent domain proceedings, we are quite aware of the fact that assessment valuations may not be relied upon either as a matter of law or shall we say common sense, and experience indicates how unwise it would be to do so.

Mr. Bryant: "We merely present it for whatever weight it may carry as to the value of the property. The usual assessment practice is to assess on a 10-year basis and the general average market value or the percentage of the market value, I should say, judged on a 10-year basis. The policy of the assessor's office is to arrive at as approximately a correct assessment as they can of the assessed valuation. In the event they are too high, it has been quite common practice for taxpayers to appear before the County Board of Supervisors, sitting as a board of equalization, for the purpose of reduction of such taxes, and the prices arrived at through the years should come to some figure which is fairly close to the market value of the property.

Mr. Kumler: "I think your Honor might also notice that the assessed values put on certain types of properties, especially properties like expensive homes and residences, almost invariably exceed what they are sold for when they are put on the market, which is a notorious fact.

(Narrative Testimony of C. G. Brown)

I am content to leave the matter of whatever weight that tax appraisal shows with the court. (T. 128-130.) [98]

The Court: "I am just wondering whether, in 1939, this land could be sold for that price, the land exclusive of any buildings, had the buildings been removed.

Mr. Bryant: One would have to judge the number of lots that could be carved out of the property and then take the market value of each of those lots for residence purposes, and I think at that point you would arrive at a fairly accurate market value as to the whole property.

The Court: "Let's see; the frontage is how much on Third Street?

Mr. Bryant: "200 feet. Isn't it?

Mr. Overton: "250 feet part way back.

The Witness: "247.

The Court: "If the owner undertook to carve out lots, in 1939, for residential purposes, it would seem to me that he would attempt to avoid having a frontage on Third Street and the chances are that he might take a chance, for example, or the risk of carving out one lot facing Third Street and all the other lots fronting on Rossmore, which would mean perhaps the lots would have a depth of about 190 feet. In that neighborhood that wouldn't be unreasonable.

Q. By Mr. Kumler: "What did you say the frontage was on Rossmore? 712?

A. "That is correct. They are 200 feet deep on Rossmore.

The Court: "I think you will find that the lots on Rossmore have considerable frontage. I am not sure whether they are 100 feet on the average or not. But

(Narrative Testimony of C. G. Brown)

wouldn't you say, Mr. Brown, that, in 1939, if one were seeking to carve up this tract for residential purposes, the best chance of getting the most money out of the property would be to carve it out in some such fashion? Is that about right?

The Witness: "If you were unable to sell it as a school. If you do that, the salvage value of the buildings is very small, five or ten thousand dollars. And then I would give it considerable study. I think you probably would end up by offering sites there 75 to 100 feet. You would have to put it on an R-1 basis, single family residences.

The Court: "And wouldn't your Rossmore frontage be more advantageous (T. 130-131) [99] than Third Street?

The Witness: "The name is much better, if you could find a customer who wanted an extra-sized lot and would be glad to have that extra frontage on Third Street and pay for it and join it to his Rossmore frontage, where he might want a tennis court or swimming pool. It is useful as a back yard provided he will stand for the traffic on Third Street.

Q. By Mr. Kumler: "There was something said about the other three corners being vacant.

A. "I am quite well aware of it and have been for several years.

The Court: "In 1939, the properties in that area had shown no real estate activity shall we say ever since about the end of the 20's?

The Witness: "That would be true essentially, your Honor, as to vacant property. There was very little build-

(Narrative Testimony of C. G. Brown)

ing on it. That would be essentially true. There was very little building there. But, as one factor to be considered there, there are very few vacant lots in Windsor Square and a lot of people want to locate there. I know one banker that lived much farther out and he moved down in that part of town to get closer downtown. The principal reason that these three corners are vacant is that they were held originally probably at too high a price and then the traffic came along and kind of dulled it for residential purposes. Personally, unless you want to take a long gamble on the future, I don't think that corner there has any value over the inside property.

The Court: "Up to 1939, would you say that, among the buyers who would be interested in building the type of home such as has been built on Rossmore, by far the greater percentage of those buyers at that time were looking for homesites much farther west?"

The Witness: "I believe that is true. However, may I qualify my answer by saying that building was pretty much out during the period from 1930 to 1940? They would buy out west with the idea of building when they got around to it and were hard up and hoping they would get the money to build a nice home. They liked the sound of "Beverly Hills" or "Bel Air" or something like that.

"In fact, in real estate parlance, it is probably correct to say that the same lot is worth 25 or 40 or 50 per cent more if it is in Beverly Hills than (T. 131-133) [100] if it is in West Los Angeles. It is the name of Beverly Hills. The buyers that would have bought in there ordinarily don't like those corners on account of the traffic

(Narrative Testimony of C. G. Brown)

and that is the reason they stayed vacant. But you will find very few inside lots in that district that are vacant.

The Court: "Of course, you are talking about the improvements that took place prior to 1930, aren't you, that is, the homes to which you are referring in that neighborhood were built prior to 1930, were they not?"

The Witness: "Most of them were built before 1930."

The Court: "Wouldn't you state 95 per cent of them were?"

The Witness: "Somewhere around there."

The Court: "Was there any appreciable building of homes of that kind after 1940?"

The Witness: "I am trying to think of some that went up in there. There were not very many. Not many began to show up and, also, material began to disappear. Why I attach \$80 a foot to that inside property is because homes in there will sell and I reason from that that a vacant lot across from the Country Club must have some appeal to a possible buyer. Getting down to today, it wouldn't now at all because building costs are out of reason but in 1939 and 1940 the people were hard-pressed for ready cash. However, the supply of vacant lots in that district is so very limited. You can drive a long ways before you can find an inside lot that is vacant. There ought to be some purchaser for that. And the real estate men out there—in fact a couple of them have told me \$100 a foot was their price. I feel I was justified in discounting that a little bit, from previous experience and other reasons, and to put it in at \$80 a foot. But a lot 200 feet deep and nice buildings on there becomes very high-toned in that neighborhood in the way of buildings."

(Narrative Testimony of C. G. Brown)

The buildings are much larger on June Street and the properties have a very elegant appearance. Rossmore has nice houses. I have driven people up Rossmore and remarked about the well-kept condition of the houses. There must be a class of people in there a prospective buyer would like for neighbors, and I believe \$80 a foot would move them.

Q. By Mr. Kumler: "Do you know that the second lot north of the (T. 133-135) [101] school, the 100-foot lot, is vacant at the present time? Did you notice that fact when you examined the property?"

A. "No; I didn't. I believe there are scattered vacant lots in there and there are some on Rossmore but the exact location of them I haven't in mind at this time.

The Court: "Is this a valuation as of today or as of August, 1939, which you have given?"

The Witness: "1939 and 1940. I have put on a very small increase in building costs there for 1940, 4 per cent in some cases and in some cases less.

The Court: "In that study, did you find there were any real estate sales in that vicinity in 1939 and 1940?"

The Witness: "I didn't search for sales for the reason I did not have time. There have been sales from time to time in that district.

The Court: "How far back?"

The Witness: "All along an occasional sale. Especially the houses are moving all the time.

The Court: "I am not talking about 1944 and 1945. Would you say that there was any appreciable number of sales in that vicinity in 1939 and 1940?"

The Witness: "Of vacant lots?"

The Court: "Of vacant lots.

(Narrative Testimony of C. G. Brown)

The Witness: "Very few. There are very few vacant lots there and the market was very slow from 1939 up until this war money, and that hasn't made a great deal of difference. But there have been a few sales of vacant property.

Q. By Mr. Kumler: "Did you hear Mr. Mann's testimony yesterday that he sold a lot abutting on the Country Club grounds there, which I think was a hundred feet frontage, for a price of around \$9,000, abutting directly on the Country Club grounds?

A. "I heard him say that but I was busy making some calculations and trying to keep out of sight of the court, and I didn't catch it all. There is your \$90 a foot. (T. 135-136.) [102]

Q. "Would that be considered choice property next to the Country Club there, say on Hudson?

A. "Hudson and Third? If you will describe it to me, I might make an estimate.

Q. "Well, Hudson runs part way along the Country Club and there is another street in there that I don't recall the name of.

A. "Do you mean across the street from the Country Club?

Q. "Speaking of that general area in that vicinity, is that considered choice real estate?

A. "Very good. The values pick up as you go west from Rossmore for a block or two. And a country club across the street never hurts a residential property.

Q. "I am wondering, being a layman at this sort of thing, whether that would represent a ceiling for that area if that were the fact?

(Narrative Testimony of C. G. Brown)

A. "Well, values don't run according to mathematical exactness, if that is good English or good construction. Sometimes somebody wants to sell a lot in a hurry and he will put a low price on it. And sometimes somebody else will want a lot right bad and somebody has it listed at a high price and he will buy it anyway. You will find sales vary in price and you cannot do a messenger boy's work and take a bunch of sales and average them. You have to know the circumstances connected with each sale and should know the market. The real estate dealers, and the brokers in general, if they are competent, can put their finger on the selling price of land pretty closely. (T. 136-137.)

"In considering the possibility of selling the school I considered its use as a boys' school. I don't know whether it is limited to girls' use or not. I figured just a school. (T. 137.) If it were true that a boys' school would require a substantial amount more property for additional outdoor facilities, than the land was capable of handling and that there would be additional noise connected with a boys' school that would affect my value very little. Paige Military Academy is cramped for room and that is a boarding school. They have considerable room there; a big tennis court 175 by 125, paved, and a smaller tennis court and I believe a third one. While there is (T. 138) [103] hardly room to play baseball, you could get a lot of exercise there. And they have a gym too. If we assume that additional space were needed to properly run a boys' school it would affect my value a small amount. (T. 138.)

A. "A small amount; yes.

Mr. Kumler: "I think that is all, your Honor.

(Narrative Testimony of C. G. Brown)

The Curt: "I notice that in this Exhibit B is a reference to a gymnasium which was given a reconstruction value of \$20,000. It is not clear to me whether or not that building was included in the valuation given to us by Mr. Austin or not. Can counsel refresh my recollection on that?

Mr. Kumler: "Yes, your Honor,; that would be. The gymnasium was a part of the main school building, as you will notice when you view the premises, and that was included in his consideration.

The Court: "In other words, the main building that is referred to in Question 1 included this gymnasium insofar as Mr. Austin's testimony was concerned?

Mr. Kumler: "That is right.

The Court: "It is this segregation that has confused me.

Mr. Kumler: "The segregation here, I think, is perhaps on a different basis, on a different physical basis, in viewing this property. Mr. Austin had in mind the plans which he prepared when he erected the main building, which includes, as I understand, the gymnasium. Is that correct?

Mr. Overton: "Yes, sir.

Mr. Kumler: "His figures on the replacement cost comparable to what is included here in No. 1 would include the gymnasium.

The Court: "That would mean that Mr. Austin's conclusion represented a lesser estimate than Mr. Brown.

(Narrative Testimony of C. G. Brown)

Mr. Bryant: "I don't think there is a material difference, your Honor. I think it might be \$60 less than Mr. Brown's. However, you will notice in Mr. Brown's appraisal is a replacement cost of the main building and that includes the gymnasium. Does it not?

The Witness: "No; the gymnasium is separate. No; it is carried in Question 2 as the same. I simply segregated them in making my calculations (T. 138-140) [104] but they are all in Question 2 there.

Mr. Bryant: "You carried down the cost of the main building, \$250,000, from Question 1 to Question 2?

The Witness: "That is right.

Mr. Bryant: "Then, you add to that \$21,000 for the gymnasium?

The Witness: "That is right. And No. 1 does not include the gymnasium.

The Court: "If you take the 1939 balance which Mr. Brown has given with this, the reconstruction cost of the main building plus the gymnasium, in 1939, it would be \$265,000.

Mr. Kumler: "I would understand that.

The Court: "Is that what you wish us to understand, Mr. Brown?

The Witness: "I am sorry, your Honor; I didn't catch the first part.

The Court: "Let the reporter read it.

(Record read by reporter.)

The Witness: "That is correct.

(Narrative Testimony of C. G. Brown)

The Court: "Mr. Austin gave us a figure of \$255,-188, is that correct?

Mr. Kumler: "I think that is correct.

The Court: "And then on the other building, which is called the auditorium, Mr. Austin gave us the figure of \$75,306, and your figure, Mr. Brown, is 96 per cent of \$95,380?

The Witness: "No; 96 per cent of \$89,000, which brings it down to \$85,000.

Mr. Kumler: "Your Honor will recall Mr. Austin also testified that his estimate or his determination of replacement cost of the main building of \$255,188 was exclusive of pergolas and terraces, for which he would add \$14,000. Those are not broken down in this determination.

The Court: "You have included, have you, in your estimate the pergolas and terraces?

* The Witness: "Yes.

The Court: "Then I guess Mr. Bryant is right when he says the valuations are pretty close. (T. 140-141.) [105]

Redirect Examination—C. G. Brown

"Assuming that the deed from Hancock to Marlborough Corporation restricted the use of the property to a first-class school for girls, and that its use other than that was restricted to an R-1 use, my estimate of the market value of the premises would be changed. It [the deed restriction] would have no bearing on the R-1 use. For selling purposes under Question 5 [Defendant's

(Narrative Testimony of C. G. Brown)

Exhibit B] that would lower it. If it is to be used for girls, you are going to cut down your prospective number of buyers. I would lower my value, say, 20 per cent. That is a better school for girls; that plant is suited for girls. Boys might like a parade ground and a military school would have one. Boys like to play baseball and make a lot of racket and do need a little more room so that the sound of their noise wouldn't put the adjoining property owner up in arms. So it is primarily an establishment for girls. I think if I lowered that 20 per cent it would be safer. 15 per cent might be a better figure. My estimate was made more upon the basis of a girls' school than a boys' school. If I were hunting a purchaser, I would look for someone who wanted a girls' school, primarily a day school for girls. (T. 142-143.)

Recross-Examination—C. G. Brown

I did state that in arriving at the figure shown in defendant's Exhibit B, I took into account boys' school uses. In fact that question had not come up in my mind but I would prefer to say that 15 per cent discount would be enough over these figures I have given. (T. 143-144.) [106]

* * * * *

The foregoing testimony was considered by the Honorable Jacob Weinberger from a reading of the transcript of the proceedings before the Honorable Harry A. Hollzer. Judge Hollzer heard the testimony on September

(Narrative Testimony of C. G. Brown)

25, 26 and 27 of 1945. Judge Weinberger, the Judge who rendered the decision in this case, examined the transcript, as stated above, the Stipulations of Fact entered into in the matter, and the exhibits filed therein. On December 16, 1946, the Honorable Jacob Weinberger heard the testimony of Eugene Overton, the President of the Plaintiff corporation, in connection with the matters testified to before Judge Hollzer.

The testimony by Mr. Overton on that date is hereinafter set forth in narrative form. It is partially a duplication of the testimony previously set forth herein. [107]

* * * * *

The foregoing Narrative Statement of the Testimony is submitted by plaintiff, Marlborough Corporation, pursuant to the provisions of Rule 75, Rules of Civil Procedure for the District Court of the United States.

DEMPSEY, THAYER, DEIBERT & KUMLER

By William L. Kumler

Attorneys for Plaintiff

Service of the within Narrative Statement of the Testimony is hereby acknowledged this 2nd day of March, 1948. James M. Carter, United States Attorney, E. H. Mitchell and George M. Bryant, Assistant U. S. Attorneys, Eugene Harpole and Loren P. Oakes, Special Attorneys, Bureau of Internal Revenue, by E. H. Mitchell, Attorneys for Defendant. [111]

[Endorsed]: Filed Mar. 2, 1948.

[PORTIONS OF THE TRANSCRIPT OF
December 16, 1946]

Tr. 3, lines 2-11:

“The only thing that the court mentioned at the previous hearing was that perhaps he would like to hear the testimony of Mr. and Mrs. Overton, who are the persons whose intent, in substance, is in question in this case.

The Court: “I think I would like to have from Mr. Overton a summary, not too much in detail because we have the evidence now in the transcript, but I would like to have him make a statement, for my benefit, in review of what his status is and what his position is.”

Tr. 3, lines 20-22:

“EUGENE OVERTON,

a witness for the plaintiff, being first duly sworn, testified as follows:”

Tr. 5, line 6 thru Tr. 6, line 12:

The Court: “When was the first time that the government took the position that it has taken?

Mr. Thayer: “For the year 1939.

The Court: “And had anything similar to this, for which the government had taken this position, occurred prior to 1939?

Mr. Thayer: “To the best of my knowledge, no.

“Direct Examination

By Mr. Thayer:

Q. “Mr. Overton, can you answer that?

A. “No; it had not.

The Court: “And this was the first time, then, that you ever set this additional amount aside for the needs as stated in your testimony?

(Narrative Testimony of Eugene Overton)

The Witness: "No, your Honor. Over a period of years, the corporation has been trying to build up a surplus against future probable needs of the business; but, in 1939, that is the first time that this was ever questioned by the government. [4*]

The Court: "The first time it was questioned?

The Witness: "Yes, sir.

The Court: "That is to say, you had previously performed some acts in relation to your surplus which had never been questioned?

A. "That is correct.

The Court: "In the same proportion or not?

A. "In proportion to the profits of the corporation. Each year we established a policy, when the corporation got out of debt, which I think was about 1935, or supposedly out of debt, about 1935, I think, of then building up out of profits a surplus to guard against and protect against future contingencies in the needs of the business."

Tr. 6, line 16 thru Tr. 24, line 2:

Q. "By Mr. Thayer: Mr. Overton, what is your official capacity with the Marlborough Corporation?

A. "I am president of the Marlborough Corporation.

Q. "How long have you occupied that office?

A. "Since, I think, 1924.

Q. "Who is the officer primarily concerned with the financial problems of the corporation?

A. "I am.

The Court: "I think that was developed in the testimony and I have read that portion of the testimony.

(Narrative Testimony of Eugene Overton)

Mr. Thayer: "While we are waiting for an exhibit to come in, Stipulation No. 1 in the case shows that, on August 31, 1939, the book surplus of the corporation was \$194,344.60 and that on August 31, 1940, the book surplus was \$213,632.92. Now, will you explain to the court, Mr. Overton, just how these surpluses had been accumulated, that is to say, what was the purpose in building up these amounts instead of distributing them as dividends?

A. "I don't remember the amounts that you stated but [5] the purpose, your Honor, was to provide against contingencies such as fire, earthquake and the possibility, almost, you might say, probability, of having to move the school to a new location, renovation, repairs and new buildings and things of that kind. Do you want me to elaborate at all on that?

Mr. Thayer: "Although we don't have the official exhibit here, I have a copy of it here and probably Mr. Bryant might examine it—or I see the clerk has the papers here. Plaintiff's Exhibit 1 in evidence is entitled, 'Policy Memo Re Reserve Fund.' It reads, 'It has been for many years and still is the purpose of the stockholders and directors of Marlborough Corporation to accumulate and establish a reserve fund in cash and/or liquid securities to provide for probable future business requirements and contingencies. So far as can be foreseen at the present time, these probable business requirements and contingencies are believed to be as follows.' Then you have a list of seven items on here and I will ask you to go through those items and explain to the court the reason why these were set forth. Would your Honor care to see these first?

(Narrative Testimony of Eugene Overton)

The Court: "Is there a date on here?"

Mr. Thayer: "That is an undated document, your Honor, and the record at the present time shows that it was prepared probably sometime about 1938. There is a second one, prepared in the year 1939, which is found in the minute books, which differs slightly from the figures shown there. The figures, to my mind, are not as important in the case as the policy.

Q. "Will you just go through those, Mr. Overton, and tell the court, in your own words, why each one was set up and what you had in mind in filing it?"

A. "The first one is possible fire loss not compensated for by insurance, estimated at \$20,000. I think the amount of insurance that was carried at that time, fire insurance, was about 190,000. [6] My figures are estimates, your Honor.

The Court: "That seems to be about what you stated then.

A. "And it was my opinion when I discussed these with Mrs. Overton, and I think she relied on my opinion more than on her own, that, in the event of a fire loss, the amount of insurance coverage would by no means cover the total loss. In other words, it is almost the case generally in fires the insurance does not cover the loss. And the buildings, one of them particularly, what is called the main building, is a very bad fire risk. It is a frame building with stucco on the outside. No. 2, remodeling buildings in the event it is decided to eliminate the boarding department, and for other contingencies, estimated, \$15,000.

The Court: "That boarding department, of course, has been eliminated?"

(Narrative Testimony of Eugene Overton)

A. "That has been eliminated. And the cost ran way in excess of the 15,000. Do you want any further explanation on that?

Mr. Thayer: "I think that your Honor developed that testimony in the prior hearing.

A. "I think so; yes. The next one is additions to buildings or new buildings that may be required, estimated at \$35,000. My recollection is that that had to do, very largely, with the gymnasium and other minor matters. The gymnasium needed a great amount of additions and doing over entirely, such as paneling. That has all been done since and I don't know what the cost of it was. In fact, I doubt if that would be competent testimony in this case but at least at that time we estimated that the cost of that and other smaller matters would run to at least \$35,000. By the 'gymnasium' I meant a lot of other things, wash rooms and things of that kind. I [7] don't think it has all been done yet. Then, 4, to provide for working capital if the present lease on the school should be terminated, \$50,000.

The Court: "You say 'present lease.'

A. "Yes; that was the lease at that time. That lease was terminated in June of 1944 and at the time this memorandum was made we estimated that, to provide the working capital that would be needed when the lease terminated and when the corporation took over the operation of the school, it would require at least \$50,000. Just as one example, the summer expenses in that school for ordinary upkeep, repairs and things of that kind, payment of teachers' salaries and upkeep of the premises generally—

(Narrative Testimony of Eugene Overton)

Mr. Bryant: "Just one moment. I think, merely for the purpose of keeping the record straight, we should confine it to the expenses as they were at that time, if you will, please.

A. "That is what I meant, the expenses at that time. They usually ran between twenty and twenty-five thousand dollars, just the ordinary operating expenses, painting and things of that kind, every summer. Then we knew that, if and when the corporation took over the school, there would have to be a great deal of other renovating outside of the ordinary summer expenses.

The Court: What summer repairs did you make prior to that time? Were they extensive repairs or just the ordinary painting?

A. "Just the ordinary painting and minor repairs.

The Court: "Approximately how much did you spend every year for summer repairs?

A. "I can't tell you on repairs, your Honor, but maybe Mrs. Overton could do that. [8]

The Court: "Repairs and renovations?

A. "Repairs and renovations and the payment of salaries, and those things always ran in the neighborhood of twenty to twenty-five thousand dollars.

The Court: "You had no summer school?

A. "No summer school; no.

The Court: "And these summer repairs were paid out of your operations the same as other expenses. Is that correct?

A. "That is correct.

The Court: "Were those items charged as expenses, expenses of operation?

A. "Oh, yes.

(Narrative Testimony of Eugene Overton)

The Court: "The same as the other?"

A. "Yes.

The Court: "And the profits that you earned were in excess of all these expenses all during this time?"

A. "I think your Honor is confused. You see, at that time, in 1939 and 1940, the Marlborough School was leased by the corporation to a Miss Ada Blake.

The Court: "Yes. But that lease had been in existence only a few years, hadn't it? How many years was it?"

A. "No; it had been in existence since 1924.

Mr. Thayer: "I think the record shows 1925.

The Court: "And it expired in 1942?"

A. "It expired in 1942; yes.

The Court: "I understand.

A. "While the lease was in existence, the lessee Miss Blake was required to take care of all of those summer expenses and make the repairs and pay the salaries and so forth. What was anticipated by this memorandum was that, if and when the corporation took it over after the termination of the lease, it would have to have money set aside to make those repairs and pay the summer expenses and so forth. [9]

The Court: "From 1942 on?"

A. "From 1942 on. And that was the reason for building up that reserve for that purpose.

The Court: "This tax period covers the years 1939 and 1940?"

A. "Yes.

The Court: "August 31st?"

A. "Yes. And we at that time were building up against the day that the corporation would have to take over the school.

(Narrative Testimony of Eugene Overton)

The Court: "That was the period of time, 1939 and 1940, that the lease was still in operation?"

A. "The lease was still in operation then.

The Court: "And you determined upon this method of providing for your future needs while the school was under lease?"

A. "That is correct.

The Court: "Anticipating that you would run it yourself in 1942, is that correct?"

A. "That is correct.

Q. By Mr. Thayer: "Mr. Overton, isn't it true that the lease actually expired the 1st of September, 1942, rather than at the end of the spring term?"

A. "Yes; by its terms. But it was agreed between the lessee and the corporation that it should be terminated as of some date in June, I think about the middle of June, 1942.

The Court: "Who knew about your plans other than yourself and Mrs. Overton?"

A. "Nobody. Mrs. Overton and I are the corporation.

The Court: "Have you any advisory board of any kind?"

A. "No. The stock is entirely owned by Mrs. Overton and myself and I think my secretary is the other director.

The Court: "It is a family corporation? [10]"

A. "A family corporation.

The Court: "You have conducted this school as a private enterprise, of course, for school purposes?"

A. "Yes.

(Narrative Testimony of Eugene Overton)

The Court: "That is, you have never anticipated incorporating this into some school wherein the public would be admitted, as oftentimes happens in schools that are established with a board of trustees and the like, even though they are private schools? You have never had that in mind?

A. "Yes. As it happens, your Honor, we have given that very serious consideration. We haven't arrived at a definite plan. Mrs. Overton and I discussed the advisability of doing exactly what your Honor has in mind, getting a board of trustees to take over the school and probably giving the school to it, with the idea of perpetuating it. We have not formed any definite plans. I discussed that, Mrs. Overton and I, with several businessmen in the last two or three years. It is a very difficult thing to decide and to work out.

The Court: "But, as the corporation now functions, you can, if you want to, close the school tomorrow and sell your assets and do as you like about your own affairs?

A. "That is correct.

Q. By Mr. Thayer: "Will you continue with this, Mr. Overton? I think you had gotten down to No. 5.

A. "Yes; 5, to provide for obsolescence and depreciation, which is \$75,000. That is very much of an estimate and, if I may say so, it is an exceedingly low estimate. That school was built, the main building, in 1916. As I stated, it is a frame building, subject to quite heavy depreciation.

The Court: "What depreciation did you deduct before?

(Narrative Testimony of Eugene Overton)

Mr. Thayer: "That will be shown in the stipulation, your Honor. If I might use just round figures here, something in the neighborhood of \$7,000, wasn't it, Mr. Bryant? [11]

Mr. Bryant: "I am trying to find it.

Mr. Thayer: "It would be a composite percentage but the depreciation is that which had been allowed by the Internal Revenue Department. So, presumably it was correct and the record reflected on the books.

Mr. Bryant: "Around \$6,500, 1939.

The Court: "And what per cent would that be?

Mr. Thayer: "If I might have a moment here. I think I can figure it out. On Defendant's Exhibit C, a copy of the return for the year 1939, the depreciation rates are shown on the stucco frame buildings as $3\frac{1}{2}$ per cent. These are on costs. On the concrete auditorium, $2\frac{1}{2}$ per cent. On auditorium fixtures, none shown. Plant and machinery only had one year to go. So that was completely written off during the year. On furniture and fixtures, that were required at various times, the rate was 10 per cent generally. Taking the total figure for the year, we have a depreciation allowed and claimed of \$6,500, as against a total investment of \$240,000.

The Court: "Including the lands and buildings:

Mr. Thayer: "No, sir. Land is not depreciated, your Honor.

The Court: "You say your total investment?

Mr. Thayer: "That is just in depreciable property, with a \$6,500 allowance, or, roughly, $2\frac{1}{2}$ per cent, composite.

(Narrative Testimony of Eugene Overton)

The Court: "All right.

A. "Shall I go on?

The Court: "Yes.

A. "One of the main items had in mind at that time was the possibility that the school would have to be moved farther to the west. There is in the record an exhibit or a tabulation that I prepared showing the westward growth based on the residences of the pupils attending the school, and it [12] shows that, from, I think it was since about 1928—I have a copy of that in my briefcase, I think.

Mr. Thayer: I believe we have it attached to the stipulation.

The Court: "I think that is developed in the testimony.

Mr. Thayer: "It is set forth in the stipulation, your Honor.

A. "That record shows, your Honor, as your Honor knows, that the residences of the pupils, in the last number of years, have shifted from a preponderance east of the school to a preponderance west of the school, and a great many of them come from Westwood, Beverly Hills and that general area, which is a long way to go to school. Now, that is something that is extremely important to keep in mind and figure on, I mean from our standpoint, because the past history had one such instance of that kind. This school was established by Mrs. Overton's mother, Mrs. Mary S. Caswell, first in Pasadena and then moved into Los Angeles and was down on Twenty-third Street, a few blocks west of Figueroa Street. In 1916, or sometime prior to 1916,

(Narrative Testimony of Eugene Overton)

Mrs. Overton's mother realized that the population was moving away from her, moving away from the school, and, without going into a great deal of detail—

The Court: "I have seen that in the testimony.

A. "—the school was moved to its present location in 1916. When that was done, my mother-in-law had not established any reserve such as we have been attempting to establish or have to some extent. And she found herself in an extremely difficult financial position. And there, again, without going into detail, which I think is all in the testimony, after a great deal of difficulty and a great deal of work on [13] my part, it was finally straightened out. That was in 1939. And then it still is a very serious consideration whether or nor the school will eventually have to be moved. If it does have to be moved, it will require a great deal of money, and much more than the estimate I have set up there. That is what I had in mind mainly in the one figure which I have called obsolescence and depreciation. ..Your Honor understands probably from reading the testimony that this was merely a memorandum prepared for my own uses and not one that I intended to have made public or to come into court with. Otherwise, it would have been more detailed.

The Court: "Was there some reason why you didn't make such plans some years before or was it because it was under lease?

A. "We did, your Honor. We had that in mind ever since almost the school moved or a few years after the school moved to its present location. And, eventually, considered the westward trend, which was very marked even then, the school would again have to be moved and we were building up a reserve against that contingency.

(Narrative Testimony of Eugene Overton)

Q. By Mr. Thayer: "You say a few years after the school moved. About what year would that have been?

A. "The school moved, Mr. Thayer, as I said, in 1916, and I would say that by 1925, although that is somewhat of a guess—I don't know when it commenced to crystalize in our minds—the trend westward was very marked and we had that in mind. We were not able in those days to build up a reserve because we had to pay off the debts.

Q. "You say when you started to build a reserve back as early as 1925?

A. "No; the starting to build a reserve started right after we had paid off our indebtedness, and I think we paid [14] off our indebtedness in '34 or '35, that is, the indebtedness incurred by reason of having to move the school in the first place.

Q. "So 1939 and 1940 were no different to any other years as far as your ideas of what you were going to do were concerned?

A. "That is correct.

Q. "Will you take the next two items? I think 6 is the next one.

A. "6, to provide for earthquake damage, as no earthquake insurance is carried, estimated at \$20,000. I doubt that that needs any explanation, your Honor. That is one of those contingencies that I think any smart or careful businessman will provide against, particularly if he doesn't carry earthquake insurance, which, as your Honor knows, is extremely expensive. The next one, 7, indebtedness to Mark Overton, Georgia C. Overton and Eugene Overton, \$35,500. I stated a few minutes ago

(Narrative Testimony of Eugene Overton)

that we paid off the indebtedness on the school in 1934 or 1935. We did not pay that, in large part, out of earnings of the school. Mrs. Overton and I loaned the school \$40,000, I think it was, with which to make that payment, to pay off the indebtedness, and that is the reason for that indebtedness to us, which we have carried along rather than pay it, because we wanted always to keep a good reserve in the school account against contingencies. The other fifteen, though, is a more complicated picture, your Honor, and has a somewhat sentimental background.

Q. "That has to do with the buying of a ranch?"

A. "No. That has to do with \$20,000 that Mrs. Overton's mother wanted to leave to our grandson. I asked her not to leave it in her will because I didn't want him to get it when he was 21 and asked her to leave a memorandum or a [15] note to Mrs. Overton saying she would like that paid to him. That memorandum, I think, is in the record. And may I digress outside of the record, Mr. Reporter, while I think of it? That was to be returned to me and a copy made and I haven't gotten it.

Mr. Thayer: "The original is in our files and a copy is in the files. Did your Honor want some explanation on that?"

The Court: "It is on that list there, is it not? How does it appear there?"

A. "It doesn't appear as being indebtedness to Mark Overton, Georgia Overton and Eugene Overton.

The Court: "If you wish, you make some explanation of that.

A. "This memorandum that I speak of or this note to Mrs. Overton asked that he be paid \$20,000. At the

(Narrative Testimony of Eugene Overton)

time that we thought he ought to be paid that, which was when he was about to be married, we gave it to him out of the corporation funds, on the understanding the corporation had belonged entirely to Mrs. Overton's mother, which was to carry out her wish. Then, Price, Waterhouse, who were our corporation auditors, objected to the way I had handled it, saying that a corporation can't give away money. Well, I saw no purpose in getting into an argument with Price, Waterhouse, though the corporation had no creditors other than Mrs. Overton and myself. Nevertheless, to meet their wishes, Mrs. Overton and I actually paid that money back to the corporation by having \$10,000 credited on each of our notes. Did I make that clear?

The Court: "That is to say, the corporation paid you and Mrs. Overton so much on your notes, is that right?"

A. "That is right.

The Court: "And you took that money and applied it to your grandson? [16]"

A. "That is correct. So, actually, that money, while we intended to have it come out of Mrs. Overton's mother's estate, came out of Mrs. Overton and myself.

The Court: "But you have the stock, nevertheless, haven't you?"

A. Oh, yes; we have the stock.

The Court: "That would have been a lien on the stock had it not been paid?"

A. "I suppose it might have been.

The Court: "In other words, if that was the provision of the will or whatever the estate provision was relative to that bequest, the assets were burdened with it?"

A. "Morally burdened with it.

(Narrative Testimony of Eugene Overton)

The Court: "Now, you spoke about a ranch.

A. "At the same time that I had the discussion with Mrs. Overton's mother about her will, she had wanted to leave considerably more to our son and, as I say, I asked her not to do it. He wanted to buy a ranch. Or, before that, let me say this. I told her in fact that we would see that he was properly taken care of according to the way we thought she wanted. He wanted a ranch. This ranch cost \$15,000. There, again, to carry out what we knew were her wishes, we bought the ranch out of the school funds, had it held in trust for a number of years, and finally conveyed it to him. That was \$15,000. That makes up the other 15,000. Have I made that clear? It is rather involved.

The Court: "It is clear enough for this purpose. It may have some bearing as to how you handled the affairs of this corporation.

A. "Yes.

The Court: "That \$15,000 came out of the assets and was charged against your dividends, is that it? [17]

A. "It was charged against profits, I presume. I am not sure how that was charged.

Mr. Thayer: "I believe it was actually declared as a dividend for the year.

The Court: "That is my recollection.

A. "That is correct; yes. Your Honor remembers it better than I. Yes; we declared a dividend to Mrs. Overton and myself of \$7,500 each and paid that to our son or paid it for the ranch.

Q. "And you had theretofore and thereafter declared regular dividends, had you not, in the operation of this corporation?

(Narrative Testimony of Eugene Overton)

A. "Yes.

Q. "And are still doing that?

A. "We are still doing the same thing.

Q. "You have a fixed rate of dividend, have you, or how is it?

A. "It is a fixed rate of dividend. I think it is a dollar and a quarter a share quarterly, \$2,400 a year.

Q. "On a capital stock of \$50,000?

A. "That is correct.

Q. "And these dividends you draw and take them personally?

A. Yes, sir.

Q. "A stockholder's dividend?

A. "That is right.

Q. "This surplus that you are attempting to conserve for these two years, of course, was profits in excess of the dividends declared?

A. "That is right." [18]

Tr. 27, line 14, thru Tr. 40, line 16:

The Court: "What has the corporation done? Has it made a different kind of return than it did for those years?

A. No; we have carried along exactly the policy. I might say this. I think that the corporate books were examined for 1941. Now, I may be wrong in that. But, since the school was taken over by the corporation, that is, in 1942 and 1943 and 1944, it has been operated at a loss. So there would be no question—

Q. By Mr. Thayer: "The question would become moot, then.

A. Yes. I have that exact sum in money, and that was due to items of repairs and renovations that had to be made.

(Narrative Testimony of Eugene Overton)

The Court: "What year?

A. "Since 1942. When the corporation took it over in 1942, when Mrs. Overton started to run it, it was found it was in very bad condition and a great deal of expense had to be gone to to make renovations. Also, of course, salaries and expenses generally increased. So, ever since then, until this year, 1945 and 1946, we are on a fiscal year, from August to August, and the school has lost money.

The Court: "The petitioners have withdrawn their request for a refund on the obsolescence?

Mr. Thayer: "As I understand, your Honor; yes. The sole issue is the liability and penalty under Section 102.

The Court: "There is an entry on your corporate books of this intention, as you have detailed, in 1940, is that right?

Mr. Thayer: "That list, I understand, was made in 1938. I am a little bit green to this myself. I was in service at [19] the time the case was tried. My partner, who tried the case, is back in Washington. All I know is from the record and I know in the record Exhibit No. 2 was then in the minute book. That is a signed policy memorandum similar to the one we have there, made on November 7, 1939.

The Court: "And it was actually made at the time in 1939, was it?

Q. By Mr. Thayer: "Is that true, Mr. Overton?

A. "If that is the date on it.

The Court: "That is to say, this Exhibit No. 2 was a part of the minutes? Was it a part of the minutes or a declaration?

(Narrative Testimony of Eugene Overton)

A. "May I look at it? I think it was not a part of the minutes.

Mr. Bryant: "If I may state, your Honor, that was found among the minutes but it was not actually in the minutes.

The Court: "There was no formal adoption of that policy in the minutes?

Mr. Bryant: "There was no resolution. This witness has testified or put the date that this policy memorandum was made. You will note that is in the second year involved; not the first year. So, when we say the year 1939, we mean the year ending August 31, 1939, and this memorandum was made in the second year involved here, 1940.

The Court: "Was this policy ever ratified or adopted by the corporation as such or by the directors?

A. "Not as a formal action, your Honor.

The Court: "However, you made your return on that basis and that is what brought you to court here, is that correct?

A. "That is correct. Your Honor understands that, like most corporations of this kind, in which there are only one or two or three stockholders, they don't go in for formal [20] actions as much as bigger corporations. I discussed matters with Mrs. Overton and we would go on that basis until it was a title matter or something that had to have formal action.

The Court: "What is there on your books as a separate corporate entity to show you have adopted that policy?

A. "I think there is nothing in the minutes except I made this memorandum and put it in the minute book.

(Narrative Testimony of Eugene Overton)

The Court: "This apparently was a summary by yourself as president.

A. "Yes. That merely carries out, if your Honor please, this first memorandum made a year or two earlier. It shows a continuation of the same policy on our part. That second memorandum, I notice, is for a somewhat lesser sum.

Q. By Mr. Thayer: "Did you have in mind, Mr. Overton, a total you were attempting to accumulate, any fixed figure beyond which you didn't intend to go or you did intend to go? I notice from the record that \$250,000 had apparently been set by you as a figure to show it, is that correct?

A. "That is correct. I have always felt, until the last couple of years, that there ought to be at least \$250,000 set aside as a contingent reserve. Being able to accomplish that was so far in the future that I didn't put those figures down. Now, at the present time, in my own thinking and estimates, I have increased that very materially due to the tremendous increase in building costs and all of those things, and I have increased the insurance very materially in the last year.

Q. "Why, instead of accumulating earnings as you did for the years, didn't you simply wait until one of these contingencies occurred and then go down to the bank and borrow money for it? [21]

A. I think that is very fully set forth in the testimony. And it is extremely difficult to borrow on this type of business enterprise and on this type of property, being a sole purpose building; extremely difficult. And that was shown by the trouble I had making the loans

(Narrative Testimony of Eugene Overton)

for my mother-in-law in 1916. In fact, it would be absolutely out of the question to borrow enough money to pay for the moving the school if it had to be done. I can state that very positively.

The Court: "How much of a surplus have you or did you have at the end of 1940?"

Mr. Thayer: "At the end of 1940?"

A. "The book surplus was \$213,692.

The Court: What part of that was represented by this declaration of policy? Or I might reverse the question. What proportion of this amount as shown by the policy is reflected in the amount of surplus on hand at that time?

Mr. Thayer: "It would have been practically 90 per cent at that time. Exhibit No. 2, I think, there shows \$215,000 and they had \$213,000 on hand.

The Court: "However, I notice that Exhibit No. 2 doesn't contain any reference to the dates Mrs. Overton and Mark Overton had been paid off.

A. "No; they haven't been paid off. I guess I forgot about that thing. You understand, this was drawn up more as a memorandum for myself of what I had in mind when I drafted it, and that was, if anything happened to Mrs. Overton or to me, it would serve as a record for our son who would take over. That was the main object at the time.

The Court: "He is familiar with these operations, is he?"

A. "He is not very familiar with it but that is the reason I wanted this in the record, so that he would see what our plans were if anything happened to us. [22]

(Narrative Testimony of Eugene Overton)

The Court: "Is he as interested as you are in the operation of that school?"

A. "I think in the continuation but he has had nothing to do with the operation. I have discussed things with him from time to time.

Q. By Mr. Thayer: "Under your lease with Miss Blake, as shown by the record, the lease was to expire at the end of August, 1942. In 1939 and 1940, did you have any intention of renewing the lease to Miss Blake or entering into a new lease with anyone else?"

A. "We were not decided at that time as to whether to renew the lease or let it terminate. We didn't come to a definite conclusion until some time early in 1942.

Q. "You had no plans then, either negative or affirmative, as to the operation of the school by the corporation at that time? It was merely one of those contingencies, as set forth in your policy memorandum, is that correct?"

A. "That is correct. We had discussed it at considerable length, Mrs. Overton and I. As I say, we were undecided. We rather hoped that we would feel justified in renewing the lease to Miss Blake when the time came.

Q. "Has the corporation ever loaned any money to either you or Mrs. Overton or your son?"

Mr. Bryant: "We have stipulated, your Honor, that it has not.

A. "May I correct that stipulation?"

Mr. Bryant: That is in the original stipulation.

A. "Yes, but at the last trial, I first testified to that effect and then, over the noon hour, I found in the minutes that \$1,000, sometime in, I guess 1935 or something, had been loaned to Mrs. Overton and paid back

(Narrative Testimony of Eugene Overton)

in five days. So I called that to the court's attention. That is the only one. [23]

Q. By Mr. Thayer: "Who determined the amount of dividends to be paid through the years 1939 and 1940?"

A. "That had been by a resolution of the board of directors sometime previously.

Q. "Who were the board or the members of the board?"

A. "I don't remember who were the actual members of the board. There was a period Mrs. Overton wasn't on the board and my secretary and one of my law partners were. But it was actually determined by a conference between Mr. and Mrs. Overton.

Q. "In that conference between you and Mrs. Overton in determining this dividend policy, did you and she, or either of you, consider the income tax effects of the payment of the dividend or the withholding of the payment of a dividend?"

A. "Will you state that question again?"

Q. "In your discussion with Mrs. Overton in determining the amount of this dividend to be paid, did either you or she consider the effect of the payment of the dividend on your own personal income taxes?"

A. "No; we never took that into consideration.

Mr. Thayer: "Your Honor, I think that summarizes the testimony of Mr. Overton as it appears in the record. I know there are many holes in this testimony but I don't think we have brought out anything new. I wonder if that is what your Honor has in mind.

The Court: "It emphasizes the matters, in a short period of time, which would take a consider period of time to read into the record. You and Mrs. Overton, of

(Narrative Testimony of Eugene Overton)

course, have means and income other than that derived from your dividends in this corporation?

A. "Yes. I, of course, have my law practice and some income outside of that and Mrs. Overton has some income outside of her own. [24]

Mr. Thayer: "Do you wish to cross-examine?

Mr. Bryant: "Yes, when you are finished.

"Cross-Examination

"By Mr. Bryant:

Q. "Mr. Overton, during the taxable years in question, that is, the years ending August 31, 1939 and August 31, 1940, did you operate the school yourself or did the corporation operate the school?

A. "No.

Q. "It was operated by Miss Blake practically all within that time?

A. "That is correct.

Q. "And upon your return—have you inspected this return?

A. "Which return is that?

Q. "The 1939 return.

A. "I did a long time ago. I think I signed it, didn't I?

Q. "Yes.

A. "Yes.

Q. "You took no deductions for salaries paid? The corporation had no active operations?

A. "The corporation paid no salaries. There, again, we wanted to accumulate all funds possible in the corporation and build up a surplus, and neither myself nor anybody else took any, as I recollect.

(Narrative Testimony of Eugene Overton)

Q. "And what function was the corporation performing during those years?

A. "Do you mean as to the school?

Q. "As to the school? [25]

A. "Merely supervisory. Under the terms of the lease, the corporation had considerable supervisory powers. Mrs. Overton at times would go to the school and look things over; maybe not as much as it develops now should have been done. And questions of policy in the running of the school and changes in policy which the lessee Miss Blake wanted to make were covered by the lease and had to be approved by the corporation. And there were a number of instances in which those questions came up and consultations were held between Mrs. Overton, Miss Blake and myself, as to those changes or proposed changes in policy. Then I had numerous conferences with Miss Blake on financial matters, made quite a number of changes and modifications of the lease that she asked for, and attended to various legal matters that came up. I remember that Judge Hollzer asked me if I ever charged for that. I did not. That I think about covers it, Mr. Bryant. I think that is quite fully set forth with a good many examples in the testimony.

Q. "And, in regard to your lease, your functions were advisory to Miss Blake, who was the actual operator, were they not?

A. Advisory and supervisory, that is, under the lease we had considerable powers of supervision.

The Court: "Was she paying you a rental?

A. "She was paying us a rental, a fixed rental and a share of the profits.

(Narrative Testimony of Eugene Overton)

The Court: "Under a written lease?"

A. "Under a written lease.

Q. By Mr. Bryant: "That is in the record, the lease, is it not?"

A. "I think it is. [26]"

Mr. Thayer: "It is Exhibit A of the third stipulation.

The Court: "And she did make a profit during her operation?"

A. "Over all; yes. I think there were a few years when she didn't but I am not sure.

Mr. Bryant: "This is the only remaining question I have—

The Court: "Mr. Bryant, had this money which was set up on which is in controversy here been distributed to stockholders, have you any calculation as to the difference—

Mr. Bryant: "Yes, sir.

The Court: "Is that of record?"

Mr. Bryant: "I believe it is in Stipulation No. 3. It is sixteen hundred and some dollars as to one taxpayer. Paragraph IV of the stipulation reads, "That the accumulations of plaintiff prevented the imposition of surtax upon plaintiff's shareholders in the sum of \$2,402.99 for 1939 and \$4,199.68 for 1940." That covers both shareholders, both Mr. Overton and Mrs. Overton.

The Court: "That would have created an additional tax on the two of approximately \$6,000?"

Mr. Bryant: "That is right, your Honor.

The Court: "What year was that?"

Mr. Bryant: "That is for two years.

The Court: "But the amount involved in this proceeding is about \$7,000, is it not?"

(Narrative Testimony of Eugene Overton)

Mr. Bryant: "That is correct.

Mr. Thayer: It is actually \$8,500, your Honor, \$3,389.85 for the year 1939 and \$5,112.03 for the year 1940.

The Court: "The total amount is approximately \$12,000, less the depreciation item which is deducted, nine hundred some odd dollars? [27]

Mr. Bryant: "Yes, your Honor. I think I have no further questions. The lease is in evidence as Exhibit A and remarks in regard to that are set forth in full in the arguments and also in the testimony. I think the government's position has been presented in that regard and there is no use burdening the court with additional testimony at this time.

The Court: "May I ask this question of you, Mr. Bryant?

Mr. Thayer: "Is your Honor finished with Mr. Overton?

The Court: "Unless Mr. Overton has something additional to say.

A. "No; I think not unless I might make this remark in connection with the remark your Honor just asked as to the additional tax imposed on Mrs. Overton and myself in 1939 and 1940. That is something that I gave no consideration to. Of course, I realize, as any businessman or lawyer would, that the more dividends you get the more tax you would have to pay, but I never figured the amount of it and never knew the amount until you stated it just now. I might explain also that the tax returns of Marlborough Corporation were made out by Price, Waterhouse & Company. The tax returns of Mrs. Overton and myself were made out by an entirely differ-

(Narrative Testimony of Eugene Overton)

ent firm of auditors, Ira Frisbee & Company, and, as far as I know, neither Ira Frisbee & Company nor Price, Waterhouse have conferred on these matters. I wouldn't be sure but I don't think so. But the point I am getting at is this, that that was not taken into consideration in our attitude on paying dividends. I might add this, that, as I stated, I never knew how much more it would be and, as a matter of fact, when my income tax returns are brought in to me by the auditors, I sign them. I don't pay any attention to them because they know more about it than I do. [28]

Mr. Thayer: "A moment ago your Honor spoke of the figure '\$12,000.' I am wondering if you believe that there were \$6,000 for each Mr. Overton and Mrs. Overton. The stipulation, I think, covers \$5,000. Isn't that correct?"

Mr. Bryant: "That is correct."

Mr. Thayer: "So that the total tax assessed by the government under Section 102 is greater than the total tax they would have paid had they distributed all of the income for the year."

The Court: "That is what I understand."

Mr. Bryant: "That is correct, except, also, if the government did not assess the Section 102 tax, they would have distributed the percentage."

Mr. Thayer: "Yes."

Tr. 46, line 10 thru Tr. 46, line 23:

Mr. Thayer: Does your Honor wish to call Mrs. Overton?

The Court: "Her testimony appears in the record, does it not?"

Mr. Thayer: "Yes, sir, and would be simply a summary of her former testimony."

The Court: "I don't think I need it."

Mr. Bryant: "Your Honor understands also that our cross-examination was made in the light of Mr. Overton's testimony here, inasmuch as we had an opportunity to fully cross-examine at the previous hearing. By our cross-examination today I don't want to have it thought that our cross-examination here today was meant to be extensive but only to limiting remarks as made here on the stand today."

The Court: "I don't think that I need anything more." [29]

Tr. 47, line 19 thru Tr. 48, line 6:

The Court: "There has been nothing new developed, then, today?"

Mr. Bryant: "Nothing new developed so far as I now see."

Mr. Thayer: "If the government would wish to do so, I would not oppose a motion to strike all of the testimony as long as your Honor has heard it. It adds nothing to the record."

Mr. Bryant: "If you will, then, we will stipulate that the testimony given here today may be stricken."

The Court: "I don't know that I would concur in that stipulation. I have had a chance to size up Mr. Overton. I like to see a witness personally and then I get a better idea of who he is and what he is thinking about."

The foregoing narrative statement of the testimony as corrected by this Stipulation correcting record on appeal and designating questions and answers to be substituted for provisions of the narrative statement filed hereinbefore, is submitted by the parties pursuant to the provisions of Rule 75, Rules of Civil Procedure for the District Court of the United States.

Dated: April 15, 1948.

DEMPSEY, THAYER, DEIBERT & KUMLER

By William L. Kumler

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By George M. Bryant

Attorneys for Defendant

A True Copy. Attest, etc., Apr. 19, 1948. (Seal) Edmund L. Smith, Clerk U. S. District Court, Southern District of California; by Theodore Hocke, Deputy.

[Endorsed]: Filed April 16, 1948. [30]

[Title of District Court and Cause]

Honorable Harry A. Hollzer, Judge Presiding

TRANSCRIPT OF PROCEEDINGS ON INSPEC-
TION OF MARLBOROUGH SCHOOL PREMISES

* * * * *

Los Angeles, California, Tuesday, October 2, 1945,
2:40 P. M.

The Court: Will you tell us, Mrs. Overton, what room we are in?

Mrs. Overton: This, I suppose you would call it, is the principal's office.

The Court: You were going to tell us something.

Mrs. Overton: I have redecorated it. I have repainted it and the draperies are new. The chairs that are not new are reupholstered. I bought that table and this desk.

Mr. Bryant: Will you just give the articles?

Mrs. Overton: The refectory table and the desk and that chair were already here. This big overstuffed chair is new. This occasional chair here and this one over here are both new and the love seat is new and these three occasional tables are new. The lamp is new and the mirror is new. We had this little chair and the desk chair and that table and that chair which has been reupholstered. Those are the only things which were originally in the building.

The Court: If you will, just lead us on a tour.

Mrs. Overton: I think, if you don't mind, we will start through this way and then we will meet over at the gymnasium while one class or another is out on the

fields, and then we can go through the dressing rooms and lockers. But I think at the moment they will be changing. [2*]

The Court: Yes.

Mrs. Overton: This is the financial office, which I have redecorated. We built in these lockers. These desks were both here and the files we had.

Mrs. Overton: We just call this the entrance hall.

The Court: In other words, the room where the large table, the round table, is?

Mrs. Overton: Yes. And those chairs were here. This overstuffed chair was here and these two chairs are new and the hangings are new. And this was repapered and painted entirely. And the sofa down there was here but that was reupholstered.

The Court: Mrs. Overton, have there been any fundamental changes in partitions?

Mrs. Overton: Not in here; no. Here we have cut this door through into the hall.

The Court: Referring to what?

Mrs. Overton: This is the vice-principal's office. It was shut off. We built this office for the executive vice-principal. We had to tear out a lot of cupboards to do that and repaper. Those were new hangings. And, except for this one little chair, all of the furniture was here.

Mr. Bryant: What was done with the previous furniture [3] that you had throughout the building?

Mrs. Overton: It was given to the Good Will. We let the help who were here take anything they wanted but most of it was old-fashioned and we couldn't do anything with it. We might have sold a little of it. I couldn't swear to it.

The Court: Are you referring to the period when you took over the operation of the school in the summer of 1942?

Mrs. Overton: That is when I did all of this; yes.

Mrs. Overton: This is the living room. The living room is redecorated with new hangings. The sofa was here. I reupholstered it. And these two chairs were here. The others are all new. And this table was here.

The Court: All of the rest of the furniture here is new?

Mrs. Overton: Yes.

Mrs. Overton: This is what we call the main office and I painted this and put in new hangings. I don't remember whether this desk was here or whether I bought it. The other furniture was here.

Mrs. Overton: This is the academic vice-principal's office. The filing case was here and the desk was here. I repainted it. And the hangings are new and the two chairs are [4] new.

The Court: Are you referring to the two stuffed chairs?

Mrs. Overton: Yes.

The Court: Were the cabinets here?

Mrs. Overton: The cabinets were here; yes.

Mrs. Overton: I repainted all of these corridors and the class rooms.

The Court: That is done how often, the repainting?

Mrs. Overton: It is awfully hard to say. We touch it up every year where we need it. Sometimes we had a whole wall like that where the little darlings put their sandwiches and their shoes and left marks. I would say

for a real job, probably, I suppose, once in four years about. I wouldn't go on the witness stand and swear to that.

Mrs. Overton: This is the library. All the shelves and stacks are new and that desk is new. The tables and chairs were here. I painted it all.

Mrs. Overton: This is the students' office. We have repainted this quite recently and taken out blackboards and so on and put in this counter. The furniture was all here.

Mrs. Overton: This is Room B, where they study type- [5] writing, and I had it repainted.

Mrs. Overton: There are five reception rooms all along here. They have all been repainted. The furniture was here. I have had the chairs repainted every year.

The Court: In other words, there are five class rooms like this, are there? This is Class Room D, is it?

Mrs. Overton: This is room C. This is one of the five. There are four others similar to it.

Mrs. Overton: This is the west wing of the main building.

Mrs. Overton: This is the senior high art department and this is the junior high adjoining. We took out some partitions and threw two or three rooms into one, and I built all of those lockers out there and put up this Celotex, or whatever that wall covering is, and repainted everything. The tables were here.

Mrs. Overton: This is the junior high art room and we installed the plumbing here and built in all of these lockers and cupboards in there and had all of these things built to sit on. They sit astride. And we put all of this linoleum down also. [6]

Mrs. Overton: I have repainted all of these rooms up here.

The Court: What do you call this?

Mrs. Overton: The chemistry laboratory. We installed this experimental desk. The others were in and the chairs were here. This was two rooms before. There was a partition across here originally and this was a class room and the other was a laboratory, and I threw them into one.

The Court: Did you repaint the room?

Mrs. Overton: Yes.

Mrs. Overton: There is one room there. That I made into a faculty room and a chemistry storeroom, with these shelves and such for the chemicals.

Mrs. Overton: This corridor here I repainted.

The Court: That is the corridor attaching these various rooms?

Mrs. Overton: Yes.

Mrs. Overton: This is a class room which I repainted.

Mrs. Overton: This is the biology laboratory. I built in lockers here and repainted it all. I think that is all I did here. [7]

Mrs. Overton: This is a class room, Class Room M, which I repainted, which they use for a junior high science room. They have a sink and can do little simple experiments. And I put in new lighting fixtures in a great many of these.

Mrs. Overton: This is Class Room No. 1. I have just painted this.

Mrs. Overton: Since we left the biology laboratory, all of these are the junior class rooms.

The Court: This used to be part of the boarding department?

Mrs. Overton: Yes.

The Court: Have you mentioned that?

Mrs. Overton: No; I haven't. It was at one time but these rooms were made before I took it. They have taken away part of the boarding department for these junior high rooms. This used to be a sleeping porch where that division comes, I think. At the time the place was built, there was that fad of everybody sleeping on sleeping porches.

Mrs. Overton: This is one of the junior high home rooms, where the girls have their desks. I painted this. I put in some new desks, teachers' desks, but I can't tell you which ones. The other desks I bought a few of but not very many. [8]

Mrs. Overton: There was a small room at the end and I threw all into one and built in the lockers and shelves and painted it. This is Room 5.

The Court: What did you say you called this room?

Mrs. Overton: This is the reading room where those who have not been very well trained in their grades have special work.

The Court: In other words, this was two rooms and you removed the partition?

Mrs. Overton: Yes. This was a case where we couldn't get any more linoleum. It was out of the question.

Mrs. Overton: This is Room 3 and Room 4, I think. I didn't do anything about this but paint it.

Mrs. Overton: In here there are three little bathrooms belonging to the bedrooms. You can see where I threw three rooms together here and made this lavatory.

Mrs. Overton: I painted all of this corridor adjoining the various class rooms.

Mrs. Overton: This is the junior high library. This I painted. [9]

The Court: This open-air desk, we might call it, is in the original condition, is it?

Mrs. Overton: Yes.

The Court: Was there any exterior painting done when you took over the operation of the school?

Mrs. Overton: I painted practically the entire outside, not all in one year. There may be bits here, a wall here or there, that hadn't been, but I think, practically speaking, the whole outside of the building has been repainted.

The Court: I purposely came out on this deck because I figured the woodwork here would give one a better idea of the age and condition of the main structure.

Mrs. Overton: Yes. That has been painted every year. This balustrade around here is painted every year.

The Court: Mrs. Overton, do you recall when this part of the roof, I suppose you would call it, here was last painted?

Mrs. Overton: I know that we painted the whole front of the house in the summer of 1942 and whether that has been painted or touched up since I don't know, but I should think not.

The Court: You have how many class rooms facing the south side of the building on this second floor?

Mrs. Overton: This is the library and this is the [10] junior high office and that I redecorated and put up new hangings. This is Class Room 6, which I repainted.

The Court: Was this a bedroom?

Mrs. Overton: Yes.

The Court: And you installed blackboards, did you?

Mrs. Overton: Yes.

The Court: And chairs and desks?

Mrs. Overton: We bought some of these things but I can't tell you which ones.

Mrs. Overton: Room 7 is a class room. It was two bedrooms, which I threw together, and I put in the blackboards and painted it.

Mrs. Overton: This Room 8 in here was three bedrooms and a bath and closet, and I put in blackboards and redecorated and repainted it.

Mrs. Overton: This is the student council room. This is where the girls' council of the school government meets. This I papered and redecorated and this table is new.

Mrs. Overton: This is called my room. This is a room which I reserve if and when to change my clothes or sleep here. With the exception of this wicker chair and the small [11] table, the furniture is all new. This was repainted and the bathroom was repainted.

Mrs. Overton: This Room 15 was a bedroom which I repapered and repainted and it is now my secretary's office.

Mrs. Overton: This corridor I repainted also.

Mrs. Overton: This is a storage attic on the third floor, in the southeast corner of the building.

Mrs. Overton: We have on each side of the corridor servants' rooms. Some of these are now used as storage rooms for costumes.

Mrs. Overton: This is Room A. This is the general size of the rooms and general type of room.

The Court: These rooms originally were used for servants' quarters?

Mrs. Overton: Yes; and storage. I painted some of the rooms but I don't think I could tell you which ones. The ones we use I repainted and I had this corridor repainted.

The Court: This portion of the building gives you a better idea of its age?

Mrs. Overton: Yes, sir. [12]

The Court: What is this?

Mrs. Overton: It is a roof.

The Court: This little section of the roof looks out on the patio, northerly?

Mrs. Overton: It faces northerly; yes. It is only used for accommodation of guests.

The Court: It is ordinarily used only to accommodate guests—during what?

Mrs. Overton: During entertainments.

The Court: Are the south end and the east wing the only sections that have three stories?

Mrs. Overton: Yes, sir.

The Court: And this is all part of the original construction, is it?

Mrs. Overton: Yes. That building across the end there is the new auditorium building.

The Court: That is to say, the building we are looking at, at the northern end of the patio, is the gymnasium?

Mrs. Overton: No; what they call the auditorium or the music building.

Mr. Bryant: That is the auditorium that was built in 1928?

Mrs. Overton: Yes.

Mrs. Overton: This is Room 16, which is a sitting room [13] for the teachers who live in the house. They all live in this wing and some of the maids.

The Court: This is, in the east wing?

Mrs. Overton: Yes. This I completely refinished and redecorated.

The Court: This wing of the second floor?

Mrs. Overton: Yes.

Mrs. Overton: This is Room 17 which is a faculty bedroom. This furniture was here but I have redecorated it. That chair is new and the bed is new.

The Court: Generally speaking, would you care to make some comment as to what work was done with reference to the rooms on either side of this corridor?

Mrs. Overton: Yes; I repapered them and repainted, I think, all of them, and refurnished them. They had white painted furniture, old-fashioned. So I finished them with modern furniture. This room you can look in. This is more or less the pattern of the way we furnished them, referring to Room 27. This was repainted and repapered and redecorated.

Mrs. Overton: This is the sewing room and that painted dresser was the kind of thing that was in all of the bedrooms, with white iron beds. [14]

The Court: Would you say that is an Oregon pine dresser?

Mrs. Overton: It is a soft wood of some kind.

The Court: Very plain?

Mrs. Overton: Yes.

Mrs. Overton: This is the vocal music studio. I repainted all of this.

Mrs. Overton: This is the junior assembly room, which I repainted entirely. It had once been used as a

library, with book shelves all around, and I took those out and plastered it and painted it.

Mrs. Overton: This is the gymnasium and this is what I referred to as not being finished.

The Court: In other words, the east wall and the north wall and the upper portions of the south wall and the ceiling are not sealed?

Mrs. Overton: No.

The Court: In other words, the frame construction is exposed.

Mrs. Overton: Yes. This is a dressing room.

The Court: The dressing rooms adjoin the gymnasium to the west?

Mrs. Overton: Yes. [15]

The Court: Did you do any work here?

Mrs. Overton: We painted it, is all. I figured I couldn't begin it until I got all of it. The showers run along through there.

Mrs. Overton: The girls play on all of these fields and on the archery range there would be less than half of the senior high school at a time. Half of the senior high school have their sports from 2:00 to 3:00.

The Court: There is an open space immediately adjoining the gymnasium, to the north, which is used apparently for parking bicycles?

Mrs. Overton: Yes, and the turn-around for cars.

The Court: Then, adjoining that parking space to the north there are three practice volleyball courts?

Mrs. Overton: Yes; but that really isn't three volleyball courts. This I cut up into small ones. That is, strictly, one court. It is really one basketball court.

The Court: The three combined constituting a single basketball court?

Mrs. Overton: Yes. These are the three tennis courts north of the auditorium building. We keep this one tennis court for tennis now. Volleyball is so popular that we have turned everything into volleyball now. [16]

Mrs. Overton: We have the two combination volleyball and basketball courts on this side.

The Court: That is, on the west side adjoining the auditorium?

Mrs. Overton: Yes.

The Court: Is that your school bus?

Mrs. Overton: That is the school bus, which I am not interested in. They pick up the girls.

Mrs. Overton: This is the senior high assembly room. All of this I repainted.

The Court: Is it used as a study room?

Mrs. Overton: A study room and assembly room for the whole school. And then there is a stage here where they put on any little productions that they give.

The Court: Did you do any work here?

Mrs. Overton: We repainted this.

Mrs. Overton: And I repainted this corridor.

The Court: Is this the center of the auditorium building?

Mrs. Overton: It is the east side. The auditorium itself takes up most of the space.

The Court: On the east side of the auditorium building do you have some class rooms? [17]

Mrs. Overton: Yes; there are five and they are, roughly, like this one. All five of them I repainted. I replaced some desks and so on but I couldn't tell you which ones.

Mrs. Overton: There is a lavatory down below here, which is not important.

Mrs. Overton: We are now in the building called the music building.

The Court: How many stories?

Mrs. Overton: It is one story.

Mr. Bryant: This is part of the west wing of the main building, is it not?

Mrs. Overton: No; it isn't.

Mr. Bryant: When was this built?

Mrs. Overton: It was built at the same time as the other.

Mr. Bryant: Do we call this, for the purpose of the record, the old music building?

Mrs. Overton: Yes.

The Court: In other words, this is the original music building?

Mrs. Overton: Yes. The auditorium is strictly Caswell Hall.

The Court: Do you have a series of class rooms in this [18] old music building?

Mrs. Overton: We have this piano school. This whole building I repainted.

The Court: This is the room where I presume piano instructions are given?

Mrs. Overton: Yes.

Mrs. Overton: These two rooms, which I can't get in, I threw together. They are the supply and drug rooms. I did quite a little bit of carpentering there.

The Court: The room just mentioned is at the north-west corner of the original music building?

Mrs. Overton: Yes.

The Court: Are there other rooms in this building?

Mrs. Overton: Yes; practice rooms. That is where the a capella choir meets. This is the music department office, really.

The Court: Have any changes been made here?

Mrs. Overton: I built in these things and I painted it all. I would have put linoleum down if I could have gotten any. This is in very bad shape.

The Court: We are in the southwest section of the original music building, are we?

Mrs. Overton: Yes. [19]

The Court: This is on the east side of the original music building, is it?

Mrs. Overton: Yes, sir.

The Court: This is practically the same size as the room in the southeast corner, is it?

Mrs. Overton: Yes.

Mrs. Overton: We are now in the east wing.

The Court: And the north corner?

Mrs. Overton: The gymnasium is still north. We are south of the gymnasium.

The Court: And this particular room is called what?

Mrs. Overton: Room O. I also repainted it. This is used occasionally for a dressing room and is also used for textile work.

Mrs. Overton: This is the room where the sewing class meets. This I repainted.

Mrs. Overton: This is the domestic science kitchen. I have done practically nothing in here. This is the color

of almost everything. This is dark green and I don't think that has been painted; that is, the wood work has been painted but I don't think the walls have. [20]

Mrs. Overton: This is overall space for the actual kitchens, and this is the house manager's office, which I painted and put new hangings in, and I painted this servants' hall.

The Court: Would you call that the pantry there?

Mrs. Overton: Yes.

Mrs. Overton: This is the help's dining room, which I painted.

Mrs. Overton: This is the kitchen and this I painted and I don't think I have done anything else here.

Mrs. Overton: This is the bake shop.

The Court: Do you have any boarding students?

Mrs. Overton: We have 112 junior high girls for lunch and 45 teachers, besides the help. There are six or seven teachers who live in the house and there are 11 of the help to whom we serve breakfast and dinner. This is the main pantry and I painted this and put down new linoleum. This is where I should have the freezing unit.

The Court: In other words, you have an old-style ice box?

Mrs. Overton: Yes.

Mr. Bryant: An old-style walk-in space? [21]

Mrs. Overton: We have two dining rooms and these I painted and put new curtains on the doors and so forth.

Mr. Kumler: What about the drapes?

Mrs. Overton: The drapes were here. A lot of the carpets need replacing. They put them in in either 1940 or 1941. I haven't been able to buy a carpet since. This is the old carpet. A good many in the house are getting like it.

The Court: In other words, at the westerly exit to the westerly dining room the carpet shows the same to be very badly worn?

Mr. Bryant: How long has it been that way?

Mrs. Overton: Of course, I couldn't tell you absolutely but it was pretty bad when I took the place. As we made these new class rooms—there were carpeted bedrooms—we have been able to replace some of the carpets from the carpets in the bedrooms.

The Court: In the area that leads from one dining room to another the same condition of the carpet appears?

Mrs. Overton: Yes.

The Court: And this same worn condition also appears in other spots in the dining room?

Mrs. Overton: Yes.

Mr. Kumler: Mrs. Overton, can you tell the court how much this carpeting runs per square foot, the kind that you would buy? For this purpose you would buy it by the yard, [22] wouldn't you?

Mrs. Overton: By the square yard. It runs probably four and a half or five dollars. It just doesn't pay to get anything that doesn't wear. I don't know now what it would cost or whether you can get it at all.

Mr. Kumler: There is no way of telling how much there is of it.

The Court: I would think one could say that in normal times a carpet in this condition could at once be replaced.

Mr. Bryant: The nap seems to be worn off uniformly.

Mrs. Overton: This is the archery range on this lawn and the target is down there. I think you have seen it all.

Mr. Kumler: Will you tell the court about the carpets in this hall?

Mrs. Overton: This is the entrance hall or the main hall in this building, both the part that runs north and south and the part that runs east and west. That was carpeted in 1941 and I have the price of that because I asked Mrs. Marsden how much that came to. That came to \$1,050.

The Court: Do you think you could compute what it cost per yard?

Mrs. Overton: She put down for me 177 square yards at \$1,048.

The Court: If you have shown us everything, I think we [23] will be on our way.

Mrs. Overton: I think we have covered the entire ground.

The Court: Thank you very much.

Mrs. Overton: Not at all.

[Endorsed]: Filed March 2, 1948. [24]

[Title of District Court and Cause]

STIPULATION NO. 1

It is hereby stipulated and agreed by and between the parties through their respective counsel that the Court may accept the following as facts in this proceeding subject to the right of either party to explain or amplify or to cross-examine in regard thereto:

1. That the plaintiff at all times material hereto was a California Corporation having its principal place of business at 735 Roosevelt Building, Los Angeles, California.

2. That all the taxes sought to be recovered in this proceeding were collected by Nat Rogan, Collector of Internal Revenue at Los Angeles, California, and that at the time this action was commenced, said Nat Rogan was no longer in office.

3. That the taxes sought to be recovered in this proceeding are surtaxes levied and collected from plaintiff under the provisions of Section 102, of the Revenue Act of 1938 and of the Internal Revenue Code respectively, for the plaintiff's taxable year ended August 31, 1939 and August 31, 1940, together with interest paid to defendant by reason of the asserted late payment of said taxes.

4. That on or before the time required by law, plaintiff filed its income tax return on form 1120 as follows:

For the year ended	Showing net taxable income of	Showing income tax liabilities of
August 31, 1939	\$37,337.55	\$6,279.36
August 31, 1940	\$21,870.32	\$2,535.91

and that neither the amount of the net income nor the income tax liability shown in said returns is in dispute in this proceeding.

(Stipulation No. 1)

5. That by letter dated July 7, 1942, the Commissioner of Internal Revenue acting for and on behalf of defendant asserted deficiencies in Federal income taxes against the plaintiff as follows:

For the year ended	Income taxes under Section 13	Surtaxes under Section 102*	Total deficiency for the year
August 31, 1939	None	\$3,389.55	\$3,389.55
August 31, 1940	\$924.46	\$5,112.03	\$6,036.49

together with interest for the late payment of said taxes according to law.

6. That on July 31, 1942, plaintiff paid to Nat Rogan Collector of Internal Revenue at Los Angeles the entire amount of the deficiencies asserted by the defendant (as set forth in paragraph 5 above) plus interest for the late payment of said deficiencies as follows:

For the year ended	Income taxes under Section 13	Surtaxes under Section 102	Interest on deficiency for the year
August 31, 1939	None	\$3,389.55	\$551.24
August 31, 1940	\$924.46	\$5,112.03	\$619.52

and that interest of \$1.67 and \$2.98 respectively were overpaid by plaintiff for the two years.

7. That of the taxes and interest paid, as set forth in paragraph 6 above, only the surtaxes paid for each of the two years under Section 102 of the law, together with the interest paid thereon, are in controversy in this proceeding, plaintiff having abandoned its claim with respect to the income taxes under Section 13, in the amount of \$924.46 together with the interest paid thereon.

8. That on August 7, 1943, and within two years of the date of payment of the deficiencies in Federal income

*For the year ended August 31, 1939 under the 1938 Revenue Act; for the year ended August 31, 1940 under the Internal Revenue Code.

(Stipulation No. 1)

and surtaxes hereinabove described, plaintiff filed its claims for refund on form 843 for the taxable years ended August 31, 1939 and August 31, 1940, true copies of which are attached to the plaintiff's complaint in this proceeding and marked "Exhibit 1" and "Exhibit 2" respectively; that each of said claims set forth, under oath, the grounds for refund relied upon in this proceeding and facts describing, in detail, the factual bases of the claims; that on November 5, 1943, the Commissioner of Internal Revenue mailed, by registered mail, his notices of disallowance of said claims, excepting however that the Commissioner determined over-assessments of \$41.98 and \$85.75, respectively, for the years ended August 31, 1939 and August 31, 1940 due to the exclusion from plaintiff's gross income of certain nontaxable bond interest erroneously reported in its returns for said years, and that, except for the over-assessments of \$41.98 and \$85.75, defendant has and still does refuse to refund or repay all or any part of such taxes.

9. That plaintiff corporation was not formed for the purpose of preventing the imposition of surtaxes upon its shareholders.

10. That if regularly introduced in evidence plaintiff's books and records would show, in statement form, its financial condition, at the close of each of its taxable years ended August 31, 1931 to August 31, 1940, both inclusive, as shown in the Comparative Balance Sheet set forth in Exhibit A hereto attached.

11. That if regularly introduced in evidence plaintiff's books and records would show, in statement form, its business operations for each of its taxable years ended August 31, 1934 to August 31, 1940, both inclusive, as

(Stipulation No. 1)

shown in the Comparative Profit and Loss Statements set forth in Exhibit B hereto attached.

12. That if regularly introduced in evidence plaintiff's books and records would show, in statement form, the analysis of its surplus account for the period from August 31, 1933 to August 31, 1940 as set forth in Exhibit C hereto attached.

13. That as of August 31, 1939 and August 31, 1940, the fair market values of the stocks and bonds shown in plaintiff's balance sheets, as set forth in Exhibit A, hereto attached were \$108,245.00 and \$114,125.00 respectively, determined in accordance with the market prices thereof on each of said days.

14. That if called upon to do so, Mr. Eugene Overton would testify that during the period from July 1, 1915 to August 31, 1940, both inclusive, plaintiff corporation borrowed money in the amounts and for the purposes set forth in said Eugene Overton's affidavit hereto attached and market Exhibit D.

15. The pertinent portion of the deed covering the land upon which plaintiff's main school buildings are situated contains the following restrictions:

"This conveyance is made upon and subject to the following conditions of subsequence, all of which shall also be treated as covenants running with the land, and all of which the grantee assumes and agrees to perform and abide by, and hereby expressly makes binding upon its heirs, successors and assigns, viz;

"1st. That there shall be erected upon said premises and completed not later than one year from the date

(Stipulation No. 1)

hereof a school building in substantial conformity with plans and specifications therefor attached to a contract to be entered into by and between the Grantee herein as owner and one Fred W. Siegel, as contractor, which said contract, plans and specifications will be filed for record in the office of the County Recorder of Los Angeles County, to which said plans and specifications reference is hereby made for further particulars.

“2nd. That from and after the date for the completion of the building mentioned in the preceding subdivi-

[1st]

sion 6th, there shall be conducted upon the premises hereby conveyed for the period of at least ten years a first class school for girls; and that during such period the premises shall not, nor shall any part thereof, be used for any other purpose. But such school use may include the application of part of the grounds to athletic and other uses kindred and accessory to school uses.

“3rd. That except as provided in the two preceding conditions numbered 1st and 2nd, said property shall be used for residence purposes only and the term ‘residence purposes’ shall not include, but is distinctly understood to exclude, a use for an apartment house, hotel, flat, sanitorium or hospital, each and all of such uses being distinctly prohibited. But the term ‘residence purposes’ shall include a use of a portion of the premises for a private garage or other ordinary outbuilding for use for domestic purposes by an occupant of a residence on the property; and shall also include the right of the occupant to keep thereon livestock and fowls in small quantities for the personal domestic uses of the occupant.

(Stipulation No. 1)

"4th. * * *.

"5th. * * *.

"6th. * * *.

"7th. That no structure shall be placed upon such premises and occupied as residence at any time prior to the erection of the main residence upon the portion of the property upon which such other buildings have been or may be placed. And that any residence placed on said property shall at such time cost and be reasonably worth at least \$5,000.00.

"8th. That the Grantee shall perform the obligations hereinbefore imposed upon it with respect to street work to be done by it.

"It is provided however that the Grantee may at any time in the future pay to the grantor the sum of \$6,000.00 in gold coin of the United States together with interest thereon at the rate of 7% per annum from the date hereof to the date of payment and upon such payment the Grantor shall execute to the Grantee a release of the conditions and covenants contained in the subdivision numbered 2nd ante requiring the maintenance of a school on said property.

"And it is provided further that all of said conditions and covenants shall terminate and be of no effect after January 1, 1950; but any forfeiture for a breach occurring prior to such date shall be absolute.

"It is provided that as to the Grantee, its successors and assigns, the breach of any of the foregoing conditions and covenants shall cause such premises, together with the appurtenances, to be forfeited to and revert to the Grantor, his heirs, successors or assigns, each of whom shall have

(Stipulation No. 1)

the right of immediate entry upon such premises in the event of such breach. But the breach of any of the foregoing conditions and covenants by the owner of such property, or anyone in possession thereof under him, and any forfeiture or re-entry by reason of such breach, shall not operate to defeat or effect the lien of any mortgage or deed of trust made in good faith, and for value upon such property or any part thereof; provided however, that each, every and all of the foregoing conditions, and covenants shall at all times remain in full force and effect as against anyone requiring any title to such premises by a foreclosure or a sale under any such deed of trust or mortgage, and as against the holder of any such title a forfeiture may be enforced and a re-entry may be had for any breach by him of any of the covenants or conditions herein imposed upon or herein assumed by the Grantee, to the same extent as though the holder of such title had been the original Grantee herein named. And provided further that the breach of any of such conditions by anyone may be enjoined, abated or remedied by appropriate proceedings brought by Grantor, his successors or assigns, notwithstanding any condition of the title or liens thereon; but such rights are cumulative and the exercise thereof shall in no way effect the right of the Grantor to exercise his rights of forfeiture and re-entry where herein provided for."

16. Eugene and Georgia Overton each owned one-half of plaintiff's stock during the taxable years.

Dated: September 18, 1945.

* * * * *

(Stipulation No. 1)

EXHIBIT "A"

Page One

MARLBOROUGH CORPORATION

COMPARATIVE BALANCE SHEETS

ASSETS:	(per books)									
	8-31-1931	8-31-1932	8-31-1933	8-31-1934	8-31-1935	8-31-1936	8-31-1937	8-31-1938	8-31-1939	8-31-1940
School Property										
Land & Improvements	36,368.07	36,368.07	36,368.07	36,368.07	36,368.07	36,368.07	36,368.07	36,368.07	36,368.07	36,368.07
School Bldgs.	95,178.17	95,178.17	95,178.17	95,178.17	95,178.17	95,178.17	95,178.17	95,178.17	95,178.17	95,178.17
Auditorium & Fixtures	80,169.70	80,169.70	80,169.70	80,169.70	80,169.70	80,169.70	80,169.70	80,169.70	80,169.70	80,169.70
Plant & Machinery	3,808.53	4,034.53	4,034.53	4,034.53	4,034.53	4,034.53	4,034.53	4,034.53	4,034.53	4,034.53
Tennis Courts & Sprinklers	6,615.38	6,615.38	6,615.38	6,615.38	6,615.38	6,615.38	6,615.38	6,615.38	6,615.38	6,615.38
Auto	2,404.90	2,404.90	2,404.90	2,404.90	2,034.63	2,034.63	2,034.63	2,034.63	2,034.63	2,034.63
Linen, Dishes, Silver, etc.	2,818.33	2,818.33	2,818.33	2,818.33	2,818.33	2,818.33	2,818.33	2,818.33	2,818.33	2,818.33
Depreciation	(69,836.80)	(78,561.92)	(86,735.96)	(94,106.23)	(99,673.84)	(148,870.29)	(157,601.18)	(165,861.06)	(173,285.21)	(180,582.31)
Furn. & Fixt. (less depr.)	12,761.99	11,751.26	10,400.94	9,177.94	8,078.23	Gr. 37,124.00	37,686.08	38,337.47	38,551.71	38,687.47
Carpets (" ")	668.76	445.84	297.23	198.15	132.10	" 11,319.71	11,319.71	11,319.71	11,319.71	11,319.71
Investments										
Stocks & Bonds—Listed	58,678.75	69,928.75	58,747.55	42,686.55	61,514.22)	78,543.40)	109,294.06	(S 92,444.59	146,493.36	157,093.29
" —Unlisted	19,712.50	19,712.50	19,712.50	19,712.50	9,700.00)	")	")	(B 27,492.54	")	")
Real Estate	35,292.59	35,292.59	35,292.59	35,292.59	35,292.59	35,292.59	950.78	950.78	950.78	950.78
Note—Wm. C. DeMille Prod. Inc.	—0—	—0—	5,000.00	5,000.00	5,225.00					
Decl. of Trust 1/3						1,000.00	1,000.00			
Note Rec.						2M 200.00				
Other Assets										
Note Receivable	5,000.00	5,000.00					7,323.04	7,250.00	7,250.00	
Ada S. Blake, Lessee	9,716.45	—0—				573.53	1,765.11	5,901.07	7,682.77	
Accrued Interest Receivable	75.00	243.75	331.25	67.50	67.50	95.00	152.71	798.12	1,223.13	805.50
Cash	868.19	11,721.53	3,587.14	6,690.08	4,932.74	8,018.25	13,682.38	30,277.32	19,417.09	39,679.84
Accounts Rec.					844.01	336.48	5,524.61		95.84	8,463.08
Trustee A/C									13.11	
Deferred Charges										
Unexpired Taxes	375.00	450.00	468.34	466.83	600.00	250.00				
" Insurance	144.90	31.50	258.30	144.90	31.50	250.46	143.13	35.80	118.66	170.91
Mark Overton	—0—	—0—	—0—	14.00						
	<u>\$300,820.41</u>	<u>\$303,604.88</u>	<u>\$274,948.96</u>	<u>\$252,933.89</u>	<u>\$253,962.86</u>	<u>\$251,851.94</u>	<u>\$260,489.24</u>	<u>\$276,165.15</u>	<u>\$287,049.76</u>	<u>\$303,807.08</u>

(Supulation No. 1)

EXHIBIT "A"

Page Two

MARLBOROUGH CORPORATION
COMPARATIVE BALANCE SHEETS

LIABILITIES AND CAPITAL:—	(per books)									
	<u>8-31-1931</u>	<u>8-31-1932</u>	<u>8-31-1933</u>	<u>8-31-1934</u>	<u>8-31-1935</u>	<u>8-31-1936</u>	<u>8-31-1937</u>	<u>8-31-1938</u>	<u>8-31-1939</u>	<u>8-31-1940</u>
Capital Stock	50,000.00	50,000.00	50,000.00	50,000.00	50,000.00	50,000.00	50,000.00	50,000.00	50,000.00	50,000.00
due 1-21-31										
Mortgage Payable—Auditorium	50,000.00	40,000.00	30,000.00	—0—						
Notes Payable										
Georgia Overton	14,000.00	14,000.00	14,000.00	14,000.00	14,000.00	14,000.00	14,000.00	14,000.00	14,000.00	14,000.00
Eugene Overton	6,500.00	6,500.00	6,500.00	6,500.00	6,500.00	6,500.00	6,500.00	6,500.00	6,500.00	6,500.00
Mark Overton	14,986.00	14,986.00	14,986.00	15,000.00	15,000.00	15,000.00	15,000.00	15,000.00	15,000.00	15,000.00
Accounts Payable	—0—	—0—	2,829.74							
Accrued Interest & Taxes Payable	1,499.32	1,288.87		1,542.42	1,855.35	Int. 414.16	414.16	414.16	414.16	414.16
" Prop. Tax						Tax 300.00				
" Salary						100.00	100.00	100.00	100.00	100.00
Street Improvement Bonds Payable	1,449.47	1,242.40				414.12	207.05			
Ada S. Blake, Lessee	—0—	2,123.92	1,960.17	850.28	961.60					
Federal Income Tax	2,990.78	1,738.08		1,500.00	1,800.00	1,300.00	6,000.00	7,700.00	6,300.00	3,700.00
" " "		513.27	513.27							
Capital Stock Tax—accrued	—0—	—0—	232.00	260.00		351.00	360.00	722.00	391.00	460.00
Excess Profits Tax				465.05						
Surplus	159,394.84	171,212.34	153,927.78	162,816.14	163,845.91	163,472.60	167,878.03	181,728.99	194,344.60	213,632.92
	<u>\$300,820.41</u>	<u>\$303,604.88</u>	<u>\$274,948.96</u>	<u>\$252,933.89</u>	<u>\$253,962.86</u>	<u>\$251,851.94</u>	<u>\$260,459.24</u>	<u>\$276,165.15</u>	<u>\$287,049.76</u>	<u>\$303,807.08</u>

(Stipulation No. 1)

EXHIBIT "B"

MARLBOROUGH CORPORATION

COMPARATIVE PROFIT AND LOSS STATEMENTS (per books)

Fiscal years ending Aug. 31	1934	1935	1936	1937	1938	1939	1940
INCOME							
School—Rental	\$21,254.61	\$21,254.61	\$26,127.75	\$30,413.58	\$30,413.58	\$30,413.58	\$30,413.58
" —Share	644.84	898.57	558.35	1,765.11	5,933.08	7,682.77	—0—
" —Capit. Addn.s	102.32	1,750.70	50.47	562.08	651.39	214.24	135.76
" —Paid by Lessee	207.07	207.07	207.07	207.07	207.05	—0—	
Interest—Bonds	760.63	135.00	222.88	232.75	424.11	2,098.00	2,762.58
—Notes Rec.	75.00	225.00		102.71	435.00	435.00	307.00
Dividends	620.00	1,074.25	2,070.11	4,280.50	3,925.90	2,956.63	4,141.00
Profit on Sale of Invest.	518.75			7,964.30		4,759.52	775.39
" " " Auto		334.63					
Pimlico Tennis Courts				642.16			
Gain—Liquidation of Trust					3,738.67		
Miscellaneous						18.08	16.70
	<u>24,183.22</u>	<u>25,879.83</u>	<u>29,236.63</u>	<u>46,170.26</u>	<u>45,728.78</u>	<u>48,577.82</u>	<u>38,552.01</u>
EXPENSES:—							
Interest	3,751.53	2,486.21	2,514.81	2,485.00	2,497.82	2,583.74	2,508.51
Taxes—general	567.14	834.68	1,418.69	548.20	920.34	1,326.35	2,310.47
Insurance	113.40	113.40	103.02	107.33	107.33		
Depreciation	8,774.61	9,188.97	9,013.54	8,730.89	8,259.88	7,424.15	7,297.10
Miscellaneous	609.04	488.72	1,214.43	782.70	618.03	784.02	968.25
Income Tax Provision	1,479.14	1,592.40	1,174.97	5,818.18	7,241.32	6,343.95	3,679.36
School—share for 1934		644.84					
Loss on Sale of Investments		9,500.84	10,095.42		6,733.10		
" " Cancel. Notes Rec.			2,825.00				
" " Sale Real Estate				20,792.59			
	<u>15,294.86</u>	<u>24,850.06</u>	<u>28,359.88</u>	<u>39,264.89</u>	<u>26,377.82</u>	<u>18,462.21</u>	<u>16,763.69</u>
NET INCOME	<u>\$ 8,888.36</u>	<u>\$ 1,029.77</u>	<u>\$ 876.75</u>	<u>\$ 6,905.37</u>	<u>\$19,350.96</u>	<u>\$30,115.61</u>	<u>\$21,788.32</u>

(Stipulation No. 1)

EXHIBIT "C"

MARLBOROUGH CORPORATION V. U. S.No. 3727 -H- CivilAnalysis of Surplus—(per books)

<u>Date</u>	<u>Item</u>	<u>Debit</u>	<u>Credit</u>	<u>Balance</u>
8-31-1933	Balance			\$153,927.78
8-31-1934	Profit & Loss		\$ 888.36	162,816.14
8-31-1935	Profit & Loss		1,029.77	163,845.91
8-31-1936	Profit & Loss		876.75	
	Dividends	\$ 1,250.00		163,472.66
8-31-1937	Profit & Loss		6,905.37	
	Dividends	2,500.00		167,878.03
8-31-1938	Profit & Loss		19,350.96	
	Dividends	5,500.00		181,728.99
8-31-1939	Profit & Loss		30,115.61	
	Dividends	17,500.00		194,344.60
8-31-1940	Profit & Loss		21,788.32	
	Dividends	2,500.00		213,632.92

Exhibit "D"

AFFIDAVIT

State of California)
) ss.
 County of Los Angeles)

Eugene Overton, being first duly sworn, deposes and says:

That he is, and during the years 1939 and 1940 was, a shareholder, officer and director of the Marlborough Corporation, plaintiff in this proceeding.

That during the period from and after January 1, 1915, to and including August 31, 1940, the plaintiff, Marlborough Corporation, borrowed the following sums from

(Stipulation No. 1)

the persons and for the purposes hereinbelow set forth, viz:

1. That on or about July 6, 1915, plaintiff became indebted to G. Allan Hancock, upon a note covering the purchase price of land, constituting the major part of the present site of plaintiff's school at 3rd and Rossmore Streets in Los Angeles, in the amount of \$14,000. This indebtedness was guaranteed by Eugene Overton.

2. That on or about September 4, 1915, plaintiff became indebted to F. W. Siegel, a contractor, upon a note and mortgage covering part of the cost of construction of plaintiff's main school building in the amount of \$32,500.

3. That on or about May 27, 1916, plaintiff borrowed the sum of \$52,500 from the Bond Investment Company of Los Angeles, to provide for unexpected additional costs incurred in erecting the plaintiff's main school building. At Eugene Overton's request, a part of this loan was guaranteed personally by G. Allan Hancock.

4. That on or about June 24, 1916, plaintiff became indebted to Mr. John C. Austin on two notes totalling \$1,680 covering architect's fees on the new main school building erected in that year.

5. That on or about September 22, 1922, plaintiff borrowed the sum of \$40,000 from the Mortgage Guarantee Company of Los Angeles, to refinance the loan of \$52,500 previously made from the Bond Investment Company on May 27, 1916.

6. That on or about June 22, 1925, plaintiff became indebted to Georgia Overton, its stockholder, in the sum

(Stipulation No. 1)

of \$7,000 covering the purchase price of a 47 foot strip of land adjoining the school grounds.

7. That on or about October 26, 1925, plaintiff borrowed from Eugene and Georgia Overton, its sole shareholders, the sum of \$40,000 which was used to pay off the loan from the Mortgage Guarantee Company made on September 22, 1922.

8. That on or about May 16, 1927, plaintiff borrowed the sum of \$60,000 from the Farmers & Merchants Bank of Los Angeles, to cover the cost of a new auditorium and classroom building erected on the premises in that year.

9. On or about June 21, 1928, plaintiff borrowed the sum of \$65,000 from the Spalding Company of Los Angeles for the purpose of refinancing the loan made on May 16, 1927, from the Farmers & Merchants Bank.

10. That of the total borrowings enumerated hereinabove, \$140,000 thereof was used for the purpose of refinancing prior loans, leaving a net amount borrowed for the period of \$172,680.

Eugene Overton

Subscribed and sworn to before me this 18th day of September, 1945.

(Seal)

M. De Viney

Notary Public in and for said County and State

My Commission Expires March 10, 1947.

[Endorsed]: Filed Sep. 18, 1945.

[Title of District Court and Cause]

STIPULATION NO. 2

It is hereby stipulated by and between the parties, through their respective counsel, that the Court may accept the following as facts in this proceeding, subject to the right of either party to explain, amplify, or cross-examine in regard thereto:

1. That if the plaintiff's auditors during the taxable years in question, Price, Waterhouse & Company, were called upon to testify regarding the property and depreciation accounts of the plaintiff corporation, they would testify that the costs of the plaintiff's depreciable properties and the depreciation sustained thereon (adjusted to income tax bases) as of the end of the taxable years ended August 31, 1939, and August 31, 1940, were as follows:

(Stipulation No. 2)

MARLBOROUGH SCHOOLSchedule of Depreciable Assets and Accumulated
Depreciation as at August 31, 1939, and
August 31, 1940

<u>Asset</u>	<u>Age Years</u>	<u>Book Value 8/31/40</u>	<u>Accumulated Depreciation 8/31/39</u>	<u>Accumulated Depreciation 8/31/40</u>	<u>Net Book Value 8/31/40</u>
(After income tax adjust.)					
Frame School					
Buildings	24	\$ 95,178.17	\$ 71,565.22	\$ 74,737.82	\$ 20,440.35
Auditorium	13	74,916.87	26,833.62	28,706.54	46,210.33
Auditorium					
Fixtures	13	5,252.83	5,252.83	5,252.83	—0—
Plant and					
Machinery		4,034.33	4,034.33	4,034.33	—0—
Tennis Courts		5,165.38	5,165.38	5,165.38	—0—
Sprinkler					
System		1,450.00	1,450.00	1,450.00	—0—
Auto		2,034.63	2,034.63	2,034.63	—0—
Linen Silver,					
Dishes		2,818.33		1,055.45	1,762.88
*Furniture and					
Fixtures		38,687.47	33,899.35	35,210.11	3,477.36
Rugs		11,319.71	11,319.71	11,319.71	—0—
Totals		<u>\$240,857.72</u>	<u>\$161,555.07</u>	<u>\$168,966.80</u>	<u>\$ 71,890.92</u>

*Only book value figure different as at August 31, 1939, was Furniture and Fixtures which was \$38,551.71 at that date. For all practical purposes, therefore, the book values as at August 31, 1939, were the same as at August 31, 1940.

2. That if regularly introduced in evidence, plaintiff's books of enrollment would disclose that the relative geographical locations of the residences of the school's day students were as follows:

(Stipulation No. 2)

MARLBOROUGH POPULATION TREND

Day Students

<u>School Year</u>	<u>East</u>	<u>West</u>	<u>Total</u>	<u>Percent of Total</u>	
				<u>East</u>	<u>West</u>
1923-24	260	74	334	77.8	22.2
1924-25	265	80	345	76.8	23.2
1925-26	143	69	212	67.4	32.6
1926-27	174	85	259	67.1	32.9
1927-28	306	168	474	64.5	35.5
1928-29	145	96	241	60.1	39.9
1929-30	170	140	310	54.8	45.2
1930-31	100	100	200	50.0	50.0
1931-32	95	78	173	54.9	45.1
1932-33	83	76	159	52.2	47.8
1933-34	73	87	160	45.6	54.4
1934-35	82	77	159	51.5	48.5
1935-36	82	97	179	45.8	54.2
1936-37	86	106	192	44.8	55.2
1937-38	88	128	216	40.7	59.3
1938-39	88	159	247	35.6	64.4
1939-40	79	149	228	34.6	65.4
1940-41	74	143	217	34.1	65.9
1941-42	70	128	198	35.3	64.7
1942-43	59	117	176	33.5	66.5
1943-44	77	168	245	31.4	68.6
1944-45	81	224	305	26.5	73.5

* * * * *

4. That after making all undisputed adjustments to its taxable net income for the years ended August 31, 1939, and August 31, 1940, plaintiff's net statutory taxable incomes for each of said years, after the federal income taxes except those under Section 102 here involved, were \$30,971.56 and \$22,829.13 respectively.

Dated: September 24, 1945.

* * * * *

[Endorsed]: Filed Sep. 24, 1945.

[Title of District Court and Cause]

STIPULATION NO. 3

It is hereby stipulated and agreed by and between the parties through their respective counsel that the Court may accept the following as facts in this proceeding subject to the right of either party to explain or amplify or to cross-examine in regard thereto:

I.

That the original capital investment in plaintiff corporation was the sum of \$50,000.00.

II.

That the surplus per plaintiff's books for the taxable years in question was:

August 31, 1939	\$194,344.60
August 31, 1940	\$213,632.92

III.

That the alleged overpayments of \$1.67 and \$2.98 for the taxable years ending August 31, 1939, and August 31, 1940, respectively, were transferred to other accounts and that the same are stated by the Collector of Internal Revenue to be scheduled for refund shortly. That said payments are not therefore in controversy in this action and are not to be included as a part of any judgment entered into herein.

IV.

That the accumulations of plaintiff prevented the imposition of surtax upon plaintiff's shareholders in the sum of \$2,402.99 for 1939 and \$4,199.68 for 1940.

(Stipulation No. 3)

V.

That attached hereto marked "Exhibit A" is the lease executed by plaintiff as lessor and Ada Blake as lessee under which lease the school was operated during the taxable years ending August 31, 1939, and August 31, 1940.

Dated: September 25, 1945.

* * * * *

Exhibit A

LEASE

This Lease and Agreement entered into as of September 1st, 1935, between Marlborough Corporation, a California corporation, Lessor, party of the first part, and Ada S. Blake, Lessee, of the City of Los Angeles, California, party of the second part.

The situation as to which the parties are contracting is as follows:

The Lessee since September 1st, 1925 has been in possession of and operating as Lessee the property hereinafter described as a girls' school, under the terms and conditions of a certain lease between Lessor and Lessee entered into June 23rd, 1925 and agreements supplemental thereto, and Lessee under the terms thereof has elected to renew said Lease for the period commencing September 1st, 1935 and ending August 31st, 1942, under the terms and conditions hereinafter set forth. Therefore, the parties do agree as follows:

I.

The Lessor hereby leases to the Lessee all of the real property situate in the City of Los Angeles, State of

(Stipulation No. 3)

California, and being the property now occupied by the Marlborough School, described as follows, to-wit:

* * * * *

Together with all furnishings and fittings now on said premises belonging to the Lessor, for the sole purpose of conducting, and the Lessee hereby agrees, during the term of this lease, to conduct on said premises and with the property hereby leased, a school for girls in the same general manner and with the same high standards and policies as said school is now being, and has for many years last past been, conducted. In the conduct of said school, the Lessee shall have the right to, and shall, use the name of "Marlborough School" or "Marlborough School for Girls." No changes in the fundamental policy or policies followed for the last preceding ten (10) years in the conduct of said school shall be made by the Lessee, unless she first obtains the written consent of the Lessor thereto.

II.

TERM OF LEASE

The term for which this lease is to continue is seven (7) years, beginning as of September 1st, 1935 and ending August 31st, 1942.

III.

TAXES, REPAIRS AND UPKEEP

During the term of this lease the Lessee shall pay all state, county, municipal and federal taxes levied and assessed against the property hereby leased, at least ten (10) days before the same become delinquent. Should the Lessee fail to pay any such taxes at least ten (10) days

(Stipulation No. 3)

before the same become delinquent, the Lessor shall have the right, at its option, to pay at any time such taxes, together with any penalties that may have attached thereto, and the amount so paid, together with interest thereon at the rate of seven per cent (7%) per annum from the date of payment until repaid by the Lessee, shall immediately become due and payable from the Lessee to the Lessor. In the event any special assessment or assessments for local improvement are levied by any governmental or lawful authority against the leased property during the term hereof, Lessee will, in the year in which any such assessment shall become due and payable and in each succeeding year of the term hereof, pay to the Lessor one-tenth of the total amount of such assessment, including the interest thereon, if any. Such payment by the Lessee shall be made upon receipt of a statement from the Lessor of the amount thereof.

The Lessee shall, during the term of this lease, keep the property hereby leased, including lawns, garden, furnishings and fittings in at least as good repair, order and condition as the same are at the time of the commencement of this lease, and renew worn out furnishings and fittings as may be necessary to maintain the standard next referred to, it being particularly understood and agreed that one of the important elements making for success in the conduct of said school is that the grounds, buildings, furnishings and fittings shall always be in first-class order and condition, and in a high state of repair and efficiency, and that the same shall at all times be kept by Lessee in at least as good condition as they are at the time of the commencement of this lease, excepting as herein otherwise provided in Paragraph XI, in the event

(Stipulation No. 3)

of damage by fire, earthquake, et cetera. All renewals or additions to the furnishings, fittings and paraphernalia of the school, the cost of which shall have been charged as one of the school expenses, shall become the property of the Lessor, subject to this lease. Wherever in this lease the words "furnishings and fittings" occur, it shall be understood to include also books, appliances, apparatus and equipment, unless the context clearly expresses a contrary intent.

IV. RENT

The Lessee agrees to pay as rental for the property hereby leased, and for the use of the name and benefit of the goodwill, on November 15th, 1935 the sum of Seven Thousand Six Hundred Three and $39/100$ Dollars (\$7,603.39), receipt whereof is hereby acknowledged, and on February 15th, 1936 the sum of Seven Thousand Six Hundred Three and $39/100$ Dollars (\$7,603.39), and on April 15th, 1936 the sum of Three Thousand Three Hundred Seventeen and $56/100$ Dollars (\$3,317.56), and on June 15th, 1936 the sum of Seven Thousand Six Hundred Three and $41/100$ Dollars (\$7,603.41), which shall be the rent from September 1st, 1935 to and including August 31st, 1936. Thereafter, during the term of this lease, the Lessee agrees to pay as rental for the said property, and for the use of the name and benefit of the goodwill, the sum of Thirty Thousand Four Hundred Thirteen and $58/100$ Dollars (\$30,413.58) per year, payable as follows:

Seven Thousand Six Hundred Three and $39/100$ Dollars (\$7,603.39) on November 15th of each year, which

(Stipulation No. 3)

shall be the rent from September 1st to December 1st of each year; Seven Thousand Six Hundred Three and 39/100 Dollars (\$7,603.39) on February 15th of each year, which shall be the rent from December 1st to March 1st of each year; Seven Thousand Six Hundred Three and 39/100 Dollars (\$7,603.39) on April 15th of each year, which shall be the rent from March 1st to June 1st of each year; and Seven Thousand Six Hundred Three and 41/100 Dollars (\$7,603.41) on June 15th, which shall be the rent from June 1st to September 1st of each year.

V.

ACCOUNTS—DETERMINATION AND DIVISION OF NET PROFITS

All money received by the Lessee in connection with the conduct of the school shall, at all times during the term of this lease, be deposited by her in a bank in the City of Los Angeles, in a separate account in which no other funds shall be deposited, and all disbursements for school expenses shall be paid by check against said account, except petty cash expenditures. Said account is sometimes hereinafter referred to as the "school account."

The school fiscal year shall be from September 1st to August 31st, and it shall be divided into two "periods," the first "period" being from September 1st to March 31st and the second "period" from April 1st to August 31st. During the term of this lease, the Lessee agrees to keep full, true and accurate books and accounts, and the keeping of such accounts shall be at all times under the general supervision and direction of the firm of Price, Waterhouse and Company, certified public accountants, and the

(Stipulation No. 3)

Lessor shall have the privilege at all times of obtaining through said accountants any information it desires from said books and accounts. Immediately after the expiration of each "period" above specified, the Lessee shall have the said books and accounts audited by such accountants and have them prepare and furnish to the Lessor a report of such audit.

The net profits shall be determined in the same general manner as heretofore determined by the audits made by Price, Waterhouse and Company; provided, however, that in determining said net profits, no reserve for depreciation shall be deducted from the gross income, and the following items shall be included as expenses of conducting the school, namely: The cost of supervision and audits by the said accountants, the cost of permanent improvements, taxes and assessments paid by the Lessee as herein provided, the rental required to be paid by the terms of this lease, cost of repairs, upkeep and renewals and additions to furnishings and fittings, the cost of insurance, and all other items of expense (except income taxes) set forth in the profit and loss accounts prepared by Price, Waterhouse and Company in their audits made during the year ending August 31st, 1934, and such other items as elsewhere in this lease it is provided shall be included as items of expense of conducting the school; and provided that the salary of the Lessee as principal of the school shall not be charged at more than Ten Thousand and 00/100 Dollars (\$10,000.00) per annum.

Immediately after the determination each year by the auditors, by the audit which shall be made immediately after August 31st of each year, of the net profits for the

(Stipulation No. 3)

last preceding fiscal year, the Lessee shall pay to the Lessor fifty per cent (50%) of the net profits for such fiscal year and fifty per cent (50%) thereof may be taken and retained by the Lessee; provided, however, that in the event any profits shall be derived from the conduct of said school for the fiscal year ending August 31st, 1936, the Lessee may take and retain thereof not exceeding Four Thousand Two Hundred Eighty-five and 83/100 Dollars (\$4,285.83), free of any claim or interest of the Lessor, and any profits for said fiscal year in excess of said sum shall be divided equally between Lessor and Lessee. If the Lessee shall take and retain from the net profits for said fiscal year all or any part of said sum of Four Thousand Two Hundred Eighty-five and 83/100 Dollars (\$4,485.83), the amount so taken and retained shall be repaid by Lessee into the school account, to be held and used as working capital. Out of any net profits derived from the conduct of said school and taken and retained by Lessee, Lessee shall from time to time repay into the school account as working capital additional sums until said working capital shall amount to the sum of Ten Thousand Dollars (\$10,000.). If after said working capital amounts to Ten Thousand Dollars (\$10,000.) it is depleted, in the operation of said school, below the said amount, Lessee will, out of profits thereafter arising and taken and retained by Lessee, restore said working capital to the amount of Ten Thousand Dollars (\$10,000.). Lessee may at her option invest and reinvest any portion of said working capital, in excess of Five Thousand Dollars (\$5,000.), in readily marketable securities, and Lessor shall not share in or be charged with any profit or loss arising from so investing said working

(Stipulation No. 3)

capital, nor shall such profit and loss be treated as a profit or loss from school operations.

Should Price, Waterhouse and Company, or any other accountants who may hereafter be employed, be unable or unwilling at any time to make any such audit or to supervise the keeping of said books and accounts, the Lessor shall have the right to appoint any other certified public accountant, or firm of public accountants, doing business in the City of Los Angeles to make said audits and to supervise the keeping of the books and accounts, and the references in this lease to Price, Waterhouse and Company shall then apply to such other auditors.

VI.

SCHOOL PRINCIPAL—ASSIGNMENT OF LEASE—VICE PRINCIPAL

It is particularly understood and agreed that this lease is given by the Lessor solely because of the fact that the directors of the Lessor have confidence in the ability of the Lessee to personally conduct the school in the manner that it should be conducted and has been conducted in the past; and the Lessee therefore agrees that she will at all times during the term of this lease, personally act and be known as the Principal of the school, and that she will at all times remain in actual personal charge, supervision and management thereof, fulfilling the duties usually incident to the position of principal of such a school, and that this lease nor any interest of Lessee in this lease shall not be hypothecated or assigned by her in whole or in part, nor shall it or any interest in it be assignable or transferable by operation of law, nor shall the premises or any portion thereof be sublet, and any

(Stipulation No. 3)

attempt to assign this lease in whole or in part, or any interest in this lease, or to sublet the premises or any part thereof, shall be wholly void. The Lessee shall not delegate her authority as principal to any other person, nor assign any of her rights under this lease.

As one of the principal motives inducing the Lessor to execute this lease is to insure, as far as possible, the continued operation of the school as in the past, and as both parties realize the necessity of always having available one who could, in case of the incapacity of the Lessee or termination of this lease, assume the duties of principal, the Lessee agrees that she will always endeavor to keep in her employ a woman who shall be known as the "vice principal" or "associate principal," and who shall perform the duties usually incident to the position of a vice principal in such a school, and who would be capable of undertaking the duties of principal and assuming the management of the school.

VII.

POLICIES—SALARIES—GENERAL EXPENSES— PERMANENT IMPROVEMENTS

It is understood that the Lessee, during the term of this lease, shall have the entire control and management of the school in all its branches and departments without interference by the Lessor; provided, however, that the Lessee shall not, without first obtaining the written consent of the Lessor, make any fundamental or material change in any existing policy or plan upon which the school is now being conducted, or any general change in the present scale of salaries paid to teachers in the school, or any change in the present method of conducting the

(Stipulation No. 3)

school which would involve a material increase or decrease in the cost of conducting it, or any addition, alteration or permanent improvement to the premises, as distinguished from repairs and renewals incidental to upkeep. Provided further, that should any additions, alterations or improvements be required by any future laws, ordinances or governmental regulations, the same may be made without the written consent of the Lessor

VIII.

DEATH OR INCAPACITY OF LESSEE

Should the Lessee die, or should she for any reason (except by reason of temporary illness or incapacity lasting not more than six consecutive months) become incapacitated to such an extent that she shall not be able to personally perform her duties as principal and manage and conduct the school, then the Lessor may, at its option, immediately terminate this lease.

IX.

OPTION TO PURCHASE

Lessee shall have the right, on September 1st, 1940 or thereafter on the date of the expiration of any "period," during the continuance of this lease, to purchase the goodwill and right to use the name of the school, provided she is not in default hereunder and has paid all rental due Lessor, and provided she has given the Lessor at least six (6) months previous notice in writing of her intention to so purchase, upon paying to the Lessor the sum of Twenty-five Thousand and 00/100 Dollars (\$25,000.00) lawful money of the United States. Upon so purchasing the goodwill and the right to use the name, she shall immediately vacate the premises hereby leased and sur-

(Stipulation No. 3)

render and deliver up the possession thereof to the Lessor, together with all furnishings and fittings therein or thereon which are the property of the Lessor, and thereupon this lease shall be terminated. Provided further, that at the time of giving notice of her intention to purchase the goodwill and right to use the name, the Lessee shall also have the right, at her option, to elect to purchase (in addition to the goodwill and right to use the name) the buildings on the premises and all the said furnishings and fittings; and should she elect so to do, the same shall, within six (6) months thereafter, (if the Lessor and Lessee cannot agree as to value) be appraised at their then reasonable value for removal, by a board of three appraisers, one to be selected by the Lessor, one by the Lessee, and the third by the two so selected. The appraisers shall certify their appraisal in writing to each party hereto. The decision of any two of the appraisers shall be binding upon both parties. On the date fixed by Lessee in her notice as the date on which she intends to purchase the goodwill, the Lessee shall pay (in addition to the purchase price of the goodwill and the right to use the name) as the purchase price of the buildings, the full appraised value thereof, and she shall pay as the purchase price of the furnishings and fittings fifty per cent (50%) of the appraised value of the whole thereof.

As soon as possible after purchasing the buildings and furniture and fittings, the Lessee shall cause the same to be removed from all the land, and shall also cause all holes and excavations to be filled with good earth and the land to be left in good order and condition. In removing the buildings care shall be taken as far as possible not to damage trees on the land.

(Stipulation No. 3)

Should the Lessee purchase the good will and right to use the name, the Lessor agrees not to conduct or cause to be conducted any other girls' school of that name in the County of Los Angeles, California, so long as the Lessee, or any person deriving title to the goodwill from her, operates a girls' school in said County. Furthermore, the Lessor declares that it does not intend, in case it sells the goodwill, to conduct thereafter any school of that name at any place, and should the statutes of California hereafter be amended so as to permit of an agreement by one selling the goodwill of a business, not to carry on a like business within greater limits than a specified county, then the Lessor agrees that it will not, during said time, conduct or cause to be conducted a girls' school of that name within the greatest area as to which the law then permits such an agreement to be made. It is, however, understood that as the land hereby leased is restricted against use prior to 1950 for anything but residence purposes or a girls' school, nothing herein contained shall be construed as prohibiting the Lessor, after the purchase of the goodwill by the Lessee, from utilizing the premises hereby leased for a girls' school, provided the name "Marlborough School," or "Marlborough School for Girls," or some similar name, is not used, and provided that no attempt shall be made to draw off any of the pupils of Lessee or those deriving title to the goodwill from her.

X.

INSURANCE

During the term of this lease, the Lessee shall at all times keep the buildings, furnishings and fittings hereby

(Stipulation No. 3)

leased, and any renewals or additions thereto, insured against damage by fire, for at least the same amount, if obtainable, as now carried by Lessee, and shall also carry such other insurance, if obtainable, as is now carried in connection with the conduct of the school. Such insurance shall be written by companies approved by the Lessor and shall provide in effect that amounts which may become due thereunder in case of loss or damage by fire shall be payable to the Lessor, or if the property is mortgaged to the mortgagee. The cost of carrying such insurance shall be paid by the Lessee and chargeable as one of the expenses of conducting the school. Furthermore, should the parties hereto agree that other types of insurance should be carried, the cost thereof shall likewise be payable by the Lessee and chargeable as one of the expenses of conducting the school. Should the Lessee fail to cause insurance to be written and carried as herein provided, the Lessor may do so, and charge the cost thereof to the Lessee, which cost upon being paid by Lessee shall be chargeable as one of the expenses of the school. The Lessee agrees not to keep any materials on said premises, or do any act which will have the effect of voiding any fire insurance.

XI.

DAMAGE BY FIRE, ETC.

Should any of the property hereby leased be damaged at any time by fire, the Lessor agrees (excepting as hereinafter otherwise provided) to apply the amount of any fire insurance money received by it, or any mortgagee, in compensation for such damage, towards repairing the damage; but should the amount of fire insurance money

(Stipulation No. 3)

received be insufficient to pay for the proper repairs and renewals, then the deficit shall be paid sixty per cent (60%) by the Lessor and forty per cent (40%) by the Lessee; provided, however, that as soon as the cost of repairing the damage is ascertained, and if it then appears that the cost will be in excess of the amount of insurance money which is to be applied towards repairing the damage, and if the Lessee is then unwilling to bear her said forty per cent (40%) of the excess, she may then elect to immediately terminate this lease; provided further, that should the main school building be so damaged by fire subsequent to September 1st, 1940, as to make it impractical to conduct the school and properly house and care for therein the pupils and teachers, then the Lessor shall, at its option, have the right to terminate this lease. In the event Lessor terminates this lease after September 1st, 1940 by reason of fire damage as aforesaid, Lessee shall, provided she is not then in default under this lease, have the right to purchase the goodwill, buildings and furnishings as given her by paragraph IX, within the period of six months from date of termination of this lease; provided Lessee shall, within thirty (30) days from receipt of notice from Lessor of such termination of this lease, give to the Lessor written notice of her intention to so purchase said goodwill, buildings and furnishings within said period.

Should the main school building be damaged at any time by earthquake, accident or by violent action of the elements (other than fire) to such an extent as to render it impractical to conduct the school and properly house and care for therein the teachers and pupils, then this lease shall immediately terminate and be at an end, and

(Stipulation No. 3)

Lessee shall have the right to at that time purchase the goodwill, buildings and furnishings as given her by paragraph XI, on giving to the Lessor the notice in this paragraph XI hereinabove specified; provided however, that if such damage is at the time covered by insurance against such damage to the extent of seventy-five per cent (75%) of the cost of repairing the damage, then the provisions above set forth in this paragraph XI as to applying the amount of fire insurance received towards the cost of rebuilding and sharing the additional cost, shall apply.

In the event that the buildings are so damaged by fire or other casualty that the school cannot be conducted and the pupils and teachers properly housed and cared for therein, then the Lessee shall be relieved of her obligation to pay the rental herein in paragraph IV provided for the period during which the school cannot be conducted therein.

* * * * *

XIV.

LESSOR RETAKING POSSESSION— ACCOUNTING

Upon any termination of this lease because of the expiration of the term thereof, or under the provisions of Paragraph VIII because of the death or incapacity of the Lessee, or, under the provisions of Paragraph XI, because of fire, earthquake, etc., the Lessor shall have the right at its option to immediately enter into and take and

(Stipulation No. 3)

retain possession of all the property hereby leased and all furniture and fittings therein or thereon which are the property of Lessor, and at its option to immediately take over and retain the conduct, control and management of the school and all business and affairs incidental thereto, together with all money, accounts and bills receivable and other assets properly belonging or appertaining to the conduct of the school and its affairs; it being intended to so provide hereby that the Lessor shall have the right to step into the place and stead of the Lessee so far as concerns the conduct, business and affairs of the school, (the Lessor also assuming the liabilities for the "period" during which the lease is so terminated); provided however, that at the end of the "period" in which the lease is so terminated, the Lessor shall cause said accountants to audit the books and accounts for the "period," and as soon as said audit is completed shall pay to the Lessee, her executor or administrator (after deducting the amount due to the date of such termination on said rental provided in Paragraph IV hereof) such proportion of the Lessee's fifty per cent (50%) of the net profits for such "period" as the time from the beginning of the period to the date the lease is terminated bears to said fifty per cent (50%) of the net profits. But if, upon any termination of this lease the Lessee exercises her right to purchase the goodwill and right to use the name, then the conduct, control and management of the school and all its business and affairs, and all moneys, accounts and

(Stipulation No. 3)

bills receivable and other assets properly belonging or appertaining to the conduct of the school and its affairs (excepting the premises hereby leased and all furnishings and fittings therein or thereon which are the property of the Lessor) shall remain in the Lessee, and she shall cause the accountants to audit the books and accounts to determine the net profits, if any, for the last preceding "period," or fraction thereof, and upon the completion of the audit the Lessee shall pay to the Lessor its fifty per cent (50%) of said net profits, as shown by said audit.

* * * * *

XVII.

INSPECTION BY LESSOR

The Lessor shall have the right to enter in and upon the premises at all reasonable times to inspect the condition thereof and of the furnishings and fittings.

In Witness Whereof, the parties herto have executed this lease on the date first above written, in duplicate.

MARLBOROUGH CORPORATION,

By Eugene Overton

President.

Lessor.

Ada S. Blake

Lessee.

[Endorsed]: Filed Sep. 25, 1945.

[PLAINTIFF'S EXHIBIT NO. 1]

Policy Memo Re Reserve Fund.

It has been for many years and still is the purpose of the stockholders and directors of Marlborough Corporation to accumulate and establish a reserve fund in cash and/or liquid securities to provide for probable future business requirements and contingencies.

So far as can be foreseen at the present time, these probable business requirements and contingencies are believed to be as follows:

(1) Possible fire loss not compensated for by insurance, estimated at	\$20,000.00
(2) Remodelling buildings in the event it is decided to eliminate the boarding department, and for other contingencies, estimated at	15,000.00
(3) Additions to buildings, or new buildings that may be required, estimated at . .	35,000.00
(4) To provide for working capital if the present lease on the School should be terminated	50,000.00
(5) To provide for obsolescence and depreciation	67,000.00
(6) To provide for earthquake damage, as no earthquake insurance is carried, estimated at	20,000.00
(7) Indebtedness to Mark Overton, Georgia C. Overton and Eugene Overton . .	35,500.00
	<hr/>
	242,500.00

(Plaintiff's Exhibit No. 1)

In order to gradually accumulate this reserve fund it is the policy to pay very moderate dividends until the reserve fund is established.

Eugene Overton

Georgia C. Overton

Case No. 3727-H Civil. Marlborough vs. U. S. A. Pltfs. Exhibit. Date Sep. 25, 1945. No. 1 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. E. N. Frankenberger, Deputy Clerk.

[PLAINTIFF'S EXHIBIT NO. 2]

Policy Memo Re Reserve Fund.

November 7, 1939.

It has been for many years and still is the purpose of the directors of the Marlborough Corporation to accumulate a reserve fund in the form of cash and liquid securities of approximately \$215,000.00 to take care of estimated requirements as follows:

- (1) Possible fire loss not compensated for by insurance \$ 20,000.00
- (2) Remodelling buildings in the event it is decided to eliminate the boarding department, and for other contingencies . . 15,000.00
- (3) Additions to buildings, or new buildings that may be required 35,000.00

(Plaintiff's Exhibit No. 2)

(4) To provide for working capital if the present lease on the School should be terminated	50,000.00
(5) To provide for obsolescence and depreciation	75,000.00
(6) To provide for earthquake damage, as no earthquake insurance is carried . .	20,000.00
	<hr/>
	\$215,000.00

In order to gradually accumulate this reserve fund it is the policy to pay very moderate dividends until one-half of the reserve fund is built up, and thereafter, if profits warrant, to materially increase the dividends, but not in excess of one-half the profits, until the reserve fund is completed.

Eugene Overton
President

Case No. 3727-H Civil. Marlborough vs. U. S. A.
Pltfs. Exhibit. Date Sep. 25, 1945. No. 2 in Evidence.
Clerk, U. S. District Court, Sou. Dist. of Calif. E. N.
Frankenberger, Deputy Clerk.

[PLAINTIFF'S EXHIBIT NO 5—Identification]

Address Reply To
"United States Attorney"
and Refer to
Initials and Number
GMB:lm

Department of Justice
UNITED STATES ATTORNEY
Southern District of California
Los Angeles 12

October 1, 1945

Edmund L. Smith, Clerk,
U. S. District Court,
Los Angeles 12, California.

Re: Marlborough Corporation v. United States
No. 3727-H

Dear Mr. Smith:

Transmitted herewith is one copy of plaintiff's exhibit No. 5 for identification which has been photostated by the Department of Justice. The original has been returned to counsel for the plaintiff in accordance with the order of Judge Hollzer dated September 27, 1945.

Very truly yours,

CHARLES H. CARR,
United States Attorney.

By George M. Bryant
George M. Bryant,
Assistant U. S. Attorney.

(Plaintiff's Exhibit No. 5—Identification)

Los Angeles, California

January 23rd, 1923

My Dear Georgia:

Herewith is a memorandum to supplement or complete my will which is in Fritz's possession. I hope to give during my life time a part of the legacies to Lucian and Nellie and Jennie, especially to Lucian. You will know, however, about this from time to time and will act accordingly.

I give this definite sum to Mark because I want him to feel that he has it for his very own. Under the circumstances, it will make no difference to you. It may be necessary to change the scale, but I think that there will be enough for everything.

I will at my leisure, make another memorandum of keepsakes that I would like given to others. If not, use your own judgment.

Mark Overton	\$20000
Lucian Knight	\$15000
Jennie Blanchard	\$ 5000
Nellie Blanchard	\$ 5000
Everett Smith	\$ 5000
Gordon Smith	\$ 5000
Nellie F. Moulton	\$ 2500
Ellen J. Flood	\$ 1000
Charles Hall	\$ 1000
Ellsworth Saunders	\$ 1000

Mary S. Caswell

Case No. 3727-H Civil. Marlborough vs. U. S. A. Pltfs. Exhibit. Date Sep. 27, 1945. No. 5 Identification. Clerk, U. S. District Court, Sou. Dist. of Calif. E. N. Frankenberger, Deputy Clerk.

[Endorsed]: Filed Oct. 3, 1945. Edmund L. Smith, Clerk.

[DEFENDANT'S EXHIBIT B]

Expert Testimony a Specialty VAndike 4078

"Over 8000 Appraisals in Southern California"

C. G. BROWN

Appraiser of Real Estate

426 South Spring Street

Los Angeles (13)

September 25, 1945.

Re Marlborough Corp. vs. United States

No. 3727-H

George M. Bryant, Esq.,

Assistant U. S. Attorney,

Los Angeles 12 Cal.

Dear Mr. Bryant:—

Herewith certain values pertaining to the Marlborough School for Girls, located at the northeast corner of Third and Roosmore, Los Angeles, as requested in your letter to me under date of September 24. As may be seen from above dates, I have not had time to make a regular, full-fledged appraisal and the figures given are therefore necessarily in the nature of preliminary ones. However, I do not surmise that, were final figures to be determined, they would vary greatly from those here used.

Question 1. Replacement cost of main building, fire-proof construction.

1st Floor,	280,000 Cu Ft at 50 cents.....	\$140,000.00
2nd "	170,840 Cu Ft 45 "	76,878.00
3rd "	49,000 " " 40 "	19,600.00
Basement	79,000 " " 25 "	19,750.00

Total Value 1940 prices..... 256,228.00

Reduce 4 per cent to obtain 1939 value or \$245,000.00

(Defendant's Exhibit B)

Question 2. Reconstruction of plant at new location—fireproof.

	<u>1939.</u>	<u>1940.</u>
Main Building	\$245,000.00	\$256,228.00
Auditorium, 269,500 Cu Ft at 33 cents.....		88,935.00
Twelve—CLK—Dempsey Insert 10083 dw “ Reduce 4 per cent for 1939 value.....	85,380.00	
Gymnasium. 63,000 Cu Ft at 35 cents ('40).....	20,000.00	21,050.00
Tennis Court 125 x 175', 22,000 sq ft.....	3,300.00	3,400.00 (15¢)
Other concrete, walks etc.	900.00	1,000.00
Garage	700.00	750.00
Landscaping and planting	3,500.00	4,000.00
Totals	<u>\$358,780.00</u>	<u>\$375,363.00</u>

Question 3. Land Value, R-1 Zone assumed.

712 Feet on Rossmore at \$80 per Front Ft.....	\$56,960.00
47 Feet on Third Street at \$70 per Front Ft.	3,290.00
Total	<u>\$60,250.00</u>

Question 4. Salvage Value of present buildings.

\$8,000.00 in 1939 and \$9,000.00 in 1940.

Question 5. Market Value of Land and Buildings “as is”.

\$135,000.00 in 1939. \$140,000.00 in 1940. August 31,
both yrs.

Thanking you kindly for this opportunity to serve you,
Very Respectfully,

C G Brown

C. G. Brown

CGB/mc

(Defendant's Exhibit B)

Case No. 3727-H Civil. Marlborough v. U. S. A. Defts. Exhibit. Date Sep. 26, 1945. No. B in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. E. N. Frankenberger, Deputy Clerk.

[Endorsed]: No. 11881. United States Circuit Court of Appeals for the Ninth Circuit. Marlborough Corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed March 11, 1948.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11881

MARLBOROUGH CORPORATION,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ORDER EXTENDING TIME FOR FILING THE
RECORD AND DOCKETING THE ACTION
IN THE APPELLATE COURT

Upon motion of appellant, consented to by appellee, and for good cause shown, the time for filing the record on appeal and docketing the action in this court is extended to Mar. 15, 1948.

Dated: January 23, 1948.

FRANCIS A. GARRECHT

Judge of the United States Circuit Court of Appeals for
the Ninth Circuit

[Title of Circuit Court of Appeals and Cause]

MOTION FOR AN ORDER EXTENDING THE
TIME FOR FILING TRANSCRIPT OF THE
RECORD AND DOCKETING THE ACTION
ON APPEAL UNDER RULE 73 OF FEDERAL
RULES OF CIVIL PROCEDURE

Whereas, Notice of Appeal in the above cause was filed with the United States District Court, Southern District of California, Central Division, on November 25, 1947, and

Whereas, the trial court, by an order duly entered, extended the time for filing the record on appeal and docketing the action in the United States Circuit Court of Appeals, to February 3, 1948, and

Whereas, in an effort to abbreviate the record on appeal, counsel for the parties have been diligently engaged in the preparation of an agreed statement of the testimony before the trial court, and

Whereas, in order to join in such an agreed statement, counsel for defendant is required, by the rules of the Department of Justice, to submit such statement to his superior in Washington, D. C., for approval, which approval may require as much as sixty to ninety days to obtain, and

Whereas, considerable expense in printing the record on appeal may be saved and the issues on appeal clarified by such an agreed statement of the testimony;

Now, Therefore, counsel for the appellant moves the Court for an order, pursuant to Rule 13, of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit, extending the time for filing the record on appeal and docketing this cause in the appellate court to May 3, 1948.

* * * * *

Defendant consents to the foregoing motion.

* * * * *

[Endorsed]: Filed Jan. 23, 1948. Re-filed Mar. 11, 1948. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause]

STIPULATION AND ORDER

It Is Stipulated by and between counsel for respective parties in the above proceeding that the Court shall consider as the record on appeal the printed record on appeal, plus such portions of the original exhibits transmitted by order of the District Court, dated March 5, 1948, as the parties may designate in their respective briefs.

Dated at Los Angeles, California, this 23d day of March, 1948.

* * * * *

It Is So Ordered this 23d day of March, 1948.

CLIFTON MATHEWS

Judge

[Endorsed]: Filed Mar. 23, 1948, Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause]

APPELLANT'S STATEMENTS OF POINTS ON
WHICH IT INTENDS TO RELY ON APPEAL

Upon appeal in the above entitled cause, appellant intends to rely upon the following points:

(a) The trial court erred in finding and concluding that appellant corporation was a holding company, within the meaning of Section 102 of the applicable revenue laws, during the taxable years in question.

(b) Assuming the trial court was correct in holding that appellant was a holding company, within the meaning of Section 102 of the applicable revenue laws, during the taxable years in question, there was ample evidence in the record by way of stipulation, testimony and admitted exhibits, to overcome any prima facie effect that status as a holding company might have had on the ultimate question of a purpose to avoid surtaxes on appellant's shareholders.

(c) After refusing to admit evidence of the amounts expended by appellant in repairing and remodeling its school properties after resuming active conduct of the school in 1942, the trial court erred in basing its conclusions upon the finding that in 1946 appellant's school properties were in good repair and had not been substantially altered.

(d) That apart from any presumptions provided by law the trial court's Findings of Fact and Conclusions of Law were clearly erroneous in the light of the stipulated

evidence and the uncontradicted testimony of the witnesses.

(e) The trial court erred in concluding that appellant had not proved there was no purpose to avoid the imposition of surtax upon its shareholders.

(f) The trial court erred in concluding upon the evidence that appellant, in either the year ended August 31, 1939 or August 31, 1940, was availed of for the purpose of preventing the imposition of surtax upon income of its shareholders through the medium of permitting its earnings and profits to accumulate instead of being divided or distributed.

Dated: April 1, 1948.

* * * * *

Service of the within Statements of Points upon which appellant intends to rely on appeal is acknowledged this 1st day of April, 1948.

* * * * *

[Endorsed]: Filed Mar. 31, 1948. Paul P. O'Brien,
Clerk.

No. 11881

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MARLBOROUGH CORPORATION,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

THOMAS R. DEMPSEY,
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FILED
JUL - 3 1948

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No. 11881
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

MARLBOROUGH CORPORATION,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

Jurisdiction.

At all times material hereto appellant has been a corporation, organized and existing under the laws of the State of California. Its principal place of business and office has been located at 735 Roosevelt Building, Los Angeles, California, and within the Sixth Internal Revenue Collection District of California [R. 222].

This is a proceeding to recover surtaxes erroneously assessed and collected by Nat Rogan, Collector of Internal Revenue for the Sixth District of California, under the provisions of Section 102 of the Revenue Act of 1938 and of the Internal Revenue Code, respectively. As said Nat Rogan was no longer in office at the time this action was commenced [R. 222] this action was brought against the United States pursuant to the provisions of Section 41 (20), Title 28, United States Code. The pleadings necessary to show jurisdiction in the District Court to hear and decide this case consist of the complaint [R. 2-12]

and the answer [R. 13-15]. The action was brought in the District Court of the United States for the Southern District of California, Central Division, pursuant to the provisions of Section 762, Title 28, United States Code, requiring the suit to be brought in the district in which the plaintiff (appellant here) resides.

Judgment for the appellee was entered August 30, 1947, and the notice of appeal was filed November 25, 1947, pursuant to the provisions of Section 230, Title 28, United States Code. Jurisdiction to review the decision of the District Court below lies in this Court under the provisions of Section 226, Title 28, United States Code.

Statement of the Case.

Appellant is a California corporation with principal office at 735 Roosevelt Building, Los Angeles, California [R. 222]. Since about 1927 its stock has been owned in equal shares by Eugene and Georgia Overton, husband and wife [R. 83]. Mrs. Overton acquired the stock from her mother, Mrs. Mary S. Caswell, at the latter's death in 1925. The stock was divided equally in a property agreement between the spouses in 1927 [R. 83-84].

During the taxable years in question (the years ended August 31, 1939, and August 31, 1940), and for some years prior thereto, the business of the appellant consisted of:

1. Owning, controlling, and leasing to one Ada Blake, the premises, buildings, equipment, furnishings, name and goodwill of a going business known as Marlborough School [R. 47, 92-93]. The physical properties consisted of land, two large school buildings, furnishings and equipment located at Third and Rossmore Streets in Los Angeles [R. 36, 237]. During the respective years in ques-

tion some 247 and 228 day students attended the school [R. 238]. Under the terms of the lease to Miss Blake, appellant reserved and on occasion exercised certain powers of control over the financial and academic activities of the lessee [R. 48, 84-94, 248]. Appellant, as lessor, also participated in the earnings from the school on a profit-sharing basis [R. 231, 246].

2. Owning and receiving the income from stocks, bonds, and notes held for the purpose of building up a reserve fund for the reasons hereafter noted [R. 99].

From the year ended August 31, 1933, to the close of the years in question appellant had net earnings, paid dividends, and had surplus balances per books and after income taxes as follows:

ANALYSIS OF SURPLUS—(per books)

<i>Date</i>	<i>Item</i>	<i>Debit</i>	<i>Credit</i>	<i>Balance</i>
8-31-1933	Balance			\$153,927.78
8-31-1934	Profit & Loss		\$ 888.36	162,816.14
8-31-1935	Profit & Loss		1,029.77	163,845.91
8-31-1936	Profit & Loss		876.75	
	Dividends	\$ 1,250.00		163,472.66
8-31-1937	Profit & Loss		6,905.37	
	Dividends	2,500.00		167,878.03
8-31-1938	Profit & Loss		19,350.96	
	Dividends	5,500.00		181,728.99
8-31-1939	Profit & Loss		30,115.61	
	Dividends	17,500.00		194,344.60
8-31-1940	Profit & Loss		21,788.32	
	Dividends	2,500.00		213,632.92

[R. 233]

During the taxable years in question appellant had taxable net income (before taxes) and before the Section 102 taxes here in issue, and paid taxes thereon as follows:

<i>Year Ended</i>	<i>Taxable Net Income</i>	<i>Ordinary Income Taxes</i>	<i>Sec. 102 Surtaxes</i>
August 31, 1939	\$37,337.55	\$6,279.36	\$3,389.55
August 31, 1940	21,870.32	3,460.37 ¹	5,112.03

[R. 222, 223]

The Section 102 surtaxes are the only taxes in issue in this case [R. 223].

Appellant was incorporated in 1910 by Mrs. Overton's mother, Mrs. Mary S. Caswell. It was first located in Pasadena and was moved shortly after to Twenty-Third Street, a little east of Hoover Street in Los Angeles [R. 36].

By 1916 the population of the city had so shifted west-erly that Mrs. Caswell decided again to move the school to its present location at Third and Rossmore in Los An-geles. Mrs. Caswell had accumulated no money to finance the move and got into serious financial difficulties [R. 37].

In acquiring a new site and buildings, the corporation, over and above what it obtained for the old site, bor-rowed \$14,000 to buy land; \$85,000 to erect the school buildings, lay out the grounds, moving expense, etc., and \$1,680 for architect's fees [R. 234]. Had it not been for the willingness of G. Allen Hancock and Eugene Overton to personally guarantee the loans, and Overton's friendship

¹\$3,460.37 is total of tax (\$2,535.91) paid on return [R. 222] plus additional tax (\$924.46) paid as deficiency and not in issue in this case [R. 223].

with Mr. Morgan Adams of the Mortgage Guarantee Company, the money could not have been obtained, and the school [corporation] would have failed [R. 44-46]. Apart from debts owing the Overton family, the corporation remained in debt from 1916 to 1934 [R. 37], and was making refinancing loans as late as 1928 [R. 235]. A total of \$172,680 was borrowed over the years to finance the cost of the original land and buildings and subsequent improvements [R. 235]. These loans were paid off out of earnings which required the payment of interest, which, as a corollary, reduced the corporation's ability to repay [R. 47].

The history of this corporation up to 1935 was, therefore, one of a continuous struggle to pay off indebtedness incurred to finance its facilities.

Some years prior to those in question [R. 37-38] Mr. Overton, who handled the financial affairs of the business [R. 36], concluded that this business should accumulate a backlog of around \$250,000 of liquid assets to provide adequate working capital; for contingencies; for replacement of expensive buildings and equipment, and for the payment of the remaining indebtedness of the corporation [R. 38, 56, 99]. In 1936 or 1937 and again in 1939 Mr. Overton undertook to verify his judgment as to the necessity for such a backlog by preparing two informal memoranda which summarized the needs of the business as he saw them [R. 38; Plaintiff's Exhibits 1 and 2, R. 257-258].

This exercise of his business judgment will be discussed in detail in the Argument. It will suffice to say here that the trial court must have found the corporation's accumulated reserve reasonable since, although it was a

hard-fought issue in the case, the court did not find it unreasonable. [See Findings and Conclusions, R. 23-29.]

In the year ended August 31, 1939, the corporation had the best earnings in many years [R. 231] and in that same year the Overton's son wanted to buy a ranch.

Before Mrs. Caswell died she desired to leave her grandson, Mark Overton, a considerable sum of money in her will. The Overtons, not wishing the boy to consider himself as having such a sum as an inheritance, asked Mrs. Caswell to put her wishes in the form of a letter. They agreed to pay him that sum when the proper time came [R. 66]. This letter was prepared by Mrs. Caswell and is in the record as Plaintiff's Exhibit No. 5 [R. 261]. Around 1931 an abortive attempt to fulfill this moral obligation out of Mrs. Caswell's estate was made when the son was about to be married. \$5,000 of the corporation's funds were given him in cash together with a note of the corporation for the balance. The corporation's auditors objected to this and in deference to their views the Overtons each took a credit of \$10,000 on notes which they themselves held against the corporation for moneys actually advanced to it [R. 60]. Thus, the gift did not come from Mrs. Caswell's former estate but from the parents themselves.

When, in 1939, the son wanted a ranch, the Overtons caused an extra dividend to be declared sufficient to provide the means of fulfilling what they deemed to be a moral obligation to Mrs. Caswell. This means was chosen to avoid any second complaint from the taxpayer's auditors [R. 66]. This, of course, delayed the accumulation of the contemplated reserve, but the Overtons regarded the moral obligation as being of paramount importance.

The items making up the reserve fund will be discussed more particularly in the Argument but in general consisted of certain specific needs which Mr. Overton, as the financial officer, could foresee.

In the years in question the appellant was definitely considering but had not definitely decided to take over active conduct of the academic part of the school operation at the expiration of the existing lease to Miss Blake in 1942. This was actually what occurred [R. 41, 50, 76]. In anticipation thereof Mr. Overton, in both of his reserve-fund memoranda [R. 257, 258], made provision for the working capital which would be necessary if the lease should be terminated. The \$50,000 allocated for this purpose was to cover the usual summer expenses and upkeep, about \$25,000 [R. 82] and the balance was to cover extraordinary renovation and redecoration of the interior and furnishings of the school [R. 82, 103, 192]. Mrs. Overton, who was in charge of these matters [R. 101], made the estimates of need in the latter respects [R. 40].

Mrs. Overton had long been of the opinion that the boarding school (resident students) should be eliminated [R. 40, 102]. This *was* done at the expiration of the lease [R. 40, 210]. Mrs. Overton's estimate of the expense of elimination of the boarding school was \$15,000 [R. 40].

Another need urged by Mrs. Overton was the modernization of the gymnasium, showers, and locker rooms, at an estimated cost of \$35,000. Built in 1916, the gymnasium had never been sealed; the studding was exposed and the showers and locker rooms were very old, too small, and generally inadequate [R. 41, 103-104].

A further sum of \$20,000 was provided to provide for fire losses not covered by insurance. Built in 1916,

the main (frame) building was a hazardous fire risk [R. 39]. This was also expected to partially cover the refund of tuition and payment of teachers' salaries if the school should be interrupted by a fire [R. 40].

\$20,000 was provided to cover earthquake damage and interruption of school activities thereby [R. 40, 257, 258].

\$35,500 was provided to pay the indebtedness to the Overtons [R. 257].

This had been originally incurred in 1925 to pay off the Mortgage Guarantee Company loan, made to finance the cost of the original main building [R. 235]. This item was overlooked in the 1939 memorandum [R. 44, 258].

The last item provided for was described as "obsolescence and depreciation," for which \$67,000 was provided in the early memorandum and \$75,000 in the later one [R. 257, 258]. The purpose of the provision was two-fold; to provide for replacement of buildings if replaced at the then location [R. 43], and in the alternative to partially pay the cost of moving should such course become necessary [R. 42, 43, 186].

At August 31, 1940, accumulated depreciation on the main building alone was \$74,737.82 [R. 237]. This, however, was on *original* cost, and both the witnesses for the appellant and appellee who testified as to the cost of replacing the main building put the amount at from \$255,000 [R. 115] to \$265,000 [R. 171, 263].

The earnings of the corporation were accumulated during the taxable years in issue for the purposes noted above [R. 36].

While they were aware of the tax effect of retaining such earnings in the corporation, as is any informed person, it did not influence the Overtons' decision in consider-

ing dividends to be distributed. No computations were ever made [R. 54].

No loans, except for one of about five days in 1932 in the amount of \$1,000, have ever been made to stockholders [R. 54, 59].

On the contrary the stockholders have loaned, and up through the taxable years were still loaning, money to the corporation [R. 54].

No personal assets were ever transferred to the corporation which thereafter stood the cost of upkeep [R. 55].

No profit-yielding securities, bonds or other properties have ever been transferred to the corporation to escape personal surtaxes [R. 55].

The amount of the surtaxes actually avoided were relatively small [R. 239].

The difficulties of borrowing funds were unanimously attested to by Mrs. Caswell's experience [R. 44]; by the Overtons' own experience [R. 44]; by the experience of Morgan Adams, a witness having wide experience in making loans [R. 110, 112]; by the experience of Thompson Webb, a witness of twenty-four years' experience in building and operating one of the foremost boys' schools in the country [R. 119].

The soundness of setting aside a replacement fund to cover depreciation on long-lived school buildings was unequivocally maintained by Thompson Webb and on the authority of the American Council on Education [R. 120-125].

Notwithstanding these considerations, the Commissioner of Internal Revenue asserted that the tax under Section 102 was due from appellant for its fiscal years ended August 31, 1939, and 1940, respectively [R. 223].

As was its privilege, in order to avoid the accumulation of interest, appellant elected to pay the tax and claim a refund thereof. This was done [R. 223]. Upon rejection of those claims this suit was brought to recover the tax by court action.

The case was heard by the late Judge Harry A. Hollzer who passed away before rendering his decision. It was reheard by the Honorable Jacob Weinberger on December 16, 1946, in a brief hearing at which, in the words of appellee's counsel below, "nothing new" was developed [R. 35, 203]. It was taken under submission by Judge Weinberger by a pre-trial order dated October 2, 1946, upon the pleadings, record and briefs submitted to Judge Hollzer [R. 22].

The trial court's findings and conclusions disclose that the court's decision was based upon the following logic:

(1) The taxpayer was a mere holding company. This is *prima facie* evidence of a purpose to avoid surtaxes upon the shareholders.

(2) Taxpayer has not overcome this *prima facie* evidence and, therefore, has not proved that there was no purpose to avoid such surtaxes.

(3) Taxpayer was, therefore, availed of for the proscribed purpose. [Conclusions I, IV, II and III; R. 28-29.]

The trial court's findings and conclusions make it apparent that this case is not before this court on appeal to set aside the findings of the trial court. The problem is whether, upon the record, appellant adduced sufficient

evidence to carry its general burden of proving the absence of a purpose to avoid surtaxes upon its shareholders. In other words, the issue here is not whether the lower court erred in finding that such purpose existed, because the court was unable to do so except upon the basis of the presumptive effect of what it considered “mere” holding company status. Rather, the issue is whether the court, having been unwilling to find specifically that such purpose did exist, should have found from the evidence submitted by appellant that appellant’s accumulations were motivated by purposes other than that purpose which invokes the penalty of Section 102 of the law.

Specification of Error to Be Urged.

(1) The trial court erred in concluding that appellant was a mere holding or investment company within the meaning of Section 102 of the Revenue Act of 1938 or of Section 102 of the Internal Revenue Code.²

(2) The trial court erred in finding and concluding that the presumptive effect of appellant’s status as a holding or investment company was not overcome by the evidence introduced by appellant.

(3) The trial court erred in concluding that appellant had not proved that there was no purpose to avoid the imposition of surtax upon the income of its shareholders.

²Under Section 1, of the Internal Revenue Code, the Code was applicable to taxable years beginning after December 31, 1938. Thus the Revenue Act of 1938 applied to taxpayer’s year ended August 31, 1939.

Summary of the Argument.

(1) Appellant is not a mere holding or investment company. In the field of federal income taxation the leasing or renting of properties or of a going business has been regarded universally as operating a business as distinguished from holding or making investments.

Moreover, the appellant's activities went beyond simply leasing its properties and business. The lease reserved and the lessor exercised certain powers to control the conduct of the activities of the school. In such cases it has been held that the corporation is not a "mere" holding or investment company.

This being so, the record contains no *prima facie* or presumptive evidence of a purpose to avoid surtaxes upon its shareholders. In the absence of such presumption the sole question in issue is whether, upon the record, the appellant carried its general burden of proving that its accumulations of earnings were not motivated by the purpose proscribed by the law.

(2) In the event that the appellant is found to have been a mere holding or investment company within the meaning of the statute, that *fact* constitutes *prima facie* evidence of a purpose to avoid surtaxes in accumulating the taxpayer's earnings. This is, however, no more than a presumption. If any valid evidence to the contrary is introduced, the presumption falls and the issue then becomes whether upon the record the taxpayer has carried its burden of proving that its accumulations of earnings were not motivated by a purpose to avoid surtaxes upon the shareholders.

In the instant case there is ample evidence to rebut the presumptive effect of the fact of holding or investment

company status, should this court decide the first issue that way. By all of several tests often applied by the courts to determine the existence or absence of such purpose, the evidence, stipulated and otherwise, contradicts the presumption. Since this evidence must be reviewed in considering whether appellant carried its general burden of proof below, it will be summarized only under the third point of the Argument to avoid unnecessary repetition.

(3) In the instant case the trial court did not specifically hold that the evidence disclosed a purpose to avoid surtaxes. Indeed, the trial court could not so have held. No evidence other than that regarding the salvage value of appellant's properties was introduced by appellee, and no evidence of the proscribed purpose was elicited by appellee from the examination of any of the witnesses.

Nor did the trial court find that appellant's earnings were permitted to accumulate beyond the reasonable needs of its business. This fact, if supported by the record, would have been determinative of the purpose to avoid surtaxes unless taxpayer, by a clear preponderance of the evidence, had proved to the contrary. The fact that the trial court did not find that appellant's earnings were accumulated beyond the reasonable needs of its business amounts to a finding that such accumulations were reasonable since, by the statute, this fact was at all times a crucial issue in the case.

The precise holding of the trial court was that "plaintiff has not proved that there was no purpose to avoid the imposition of surtax upon the income of its shareholders."

The third issue on this appeal, precisely stated, is whether, at the trial below, appellant produced evidence sufficient to carry its general burden of proving the ab-

sence of that purpose to avoid surtaxes on its shareholders which is necessary to justify the collection of taxes under Section 102.

Appellant submits that the statute itself prescribes the *maximum* measure of the taxpayer's burden of proof when it provides that if its accumulation of earnings is unreasonable the taxpayer must prove the absence of such purpose by "the clear preponderance of the evidence." (Section 102(c), I. R. C., and 1938 Revenue Act.)

If, when the fact of unreasonable accumulation of earnings is present, the measure of proof necessary to enable the taxpayer to prevail is the clear preponderance of the evidence, certainly its burden of proof is not increased when the fact of unreasonable accumulation is absent.

Appellant argues that not only by the clear preponderance but by the overwhelming weight of the evidence it proved the absence of the purpose to avoid surtaxes which is the ultimate issue in the case.

Appellant so contends because by each of some dozen tests of conduct which the courts have generally applied to ascertain the purposes of management in Section 102 cases, the motives of the officers and directors of this taxpayer are shown to have been bottomed upon business considerations rather than surtax avoidance. So overwhelmingly in appellant's favor is the evidence which this record contains that even if the trial court had affirmatively found that the purpose to avoid surtaxes existed, this court would have been justified, under the rules and the cases, in setting aside such a finding as being clearly erroneous.

ARGUMENT.

I.

Appellant Was Not a Mere Holding or Investment Company Within the Meaning of Those Terms as Employed in Section 102 of the Revenue Laws.

The applicable statutory provision here involved is:

“The fact that any corporation is a mere holding or investment company shall be *prima facie* evidence of a purpose to avoid surtax upon shareholders.”³

Congress must be presumed to use words in their known and ordinary signification. The popular or received import of words furnishes the general rule for the interpretation of public laws.⁴

The ordinary signification of the word “mere” according to Webster⁵ is “only this and nothing else; nothing more than; such; and no more; *as, a mere form.*”

Had it been Congress’ intention to treat all companies which hold property or make investments alike, it would have been a simple matter to have omitted the word “mere” from the statute. That Congress did not do so conclusively shows that it intended to cover a special class of taxpayers in this provision.

A holding company is one which holds property and collects the income therefrom. An investment company is one which invests and reinvests in property not only for

³Section 102(b), Revenue Act of 1938, and of the Internal Revenue Code.

⁴*Old Colony Railroad Company v. Commissioner of Internal Revenue*, 284 U. S. 552, 52 S. Ct. 211, 76 L. Ed. 484;

⁵*Webster’s Collegiate Dictionary*, Fifth Ed., p. 1948.

the investment yield but also to derive profits from the fluctuations in value of the property.⁶

A corporation which does something substantially more than merely holding or investing in property is not a “mere” holding company.⁷

In the *Olin Corporation* case the taxpayer held the securities of a number of corporations which together constituted an integrated arms, explosives and ammunition producing group. It financed the subsidiaries with loans and by purchases of their stocks. Other than this, however, its only activities consisted of conducting certain experiments in the purification of wood fibres.

The court held that while Olin Corporation was primarily a holding and investment company, it was unwilling to say that the taxpayer was a *mere* holding or investment company under the statute.

The issue whether certain activities constitute, for tax purposes, business operations as distinguished from mere holding or investment activities, has been before the courts many times in connection with the deduction of business expenses by individuals. The leading case is *Higgins v. Commissioner of Internal Revenue*,⁸ in which it was conceded by the Commissioner and held by the

⁶Regulations 103, Sec. 19.102-2.

⁷*Olin Corporation v. Commissioner of Internal Revenue*, 42 B. T. A. 1203, 1214.

⁸312 U. S. 212, 61 S. Ct. 480, 85 L. Ed. 783.

Board of Tax Appeals that the real estate activities of the taxpayer in renting buildings constituted doing business as distinguished from “mere personal investment activities.” The Circuit Court of Appeals affirmed, and in affirming all lower courts the Supreme Court recognized the distinction by stating that expenses attributable to each type of business could be apportioned between them.⁹

In the instant case there was not only the renting of land and buildings but of all the facilities, name and goodwill of the going business known as “Marlborough School” [R. 92, 241]. Realizing the detrimental effect of mismanagement of the business, the appellant-lessor retained in the lease the power to control financial and academic policies of the lessee [R. 248]. These powers were exercised sparingly, but they were exercised from time to time during the term of the lease [R. 49].

Since it appears that the renting of property is universally regarded as operating a business as distinguished from holding investments, it follows that the trial court erred in finding appellant to be a mere holding company.

⁹Opinion at page 218.

II.

The Evidence Introduced by Appellant Was Sufficient to Overcome Any Prima Facie Effect Which the Fact of Holding Company Status May Have Created.

Should this court sustain the trial court's finding that appellant was a mere holding company under the law, that fact is only *prima facie* evidence of a purpose to avoid surtaxes.

According to the authorities "*prima facie*" evidence may have either of two characteristics:

(a) *Prima facie* evidence may be that which gives rise to a compelled inference if no evidence to the contrary is introduced. In this sense it gives rise to a presumption which disappears when contrary evidence is introduced. In such cases the issue is decided as if the presumption never existed.

Hemphill Schools, Inc. v. Commissioner of Internal Revenue, 137 F. (2d) 961;

Webre Steib Company v. Commissioner of Internal Revenue, 324 U. S. 164, 170, 65 S. Ct. 578, 89 L. Ed. 819.

(b) *Prima facie* evidence may be that which gives rise to a permissive inference. In this sense it is used to denote evidence sufficient to sustain the proponent's burden of proof in the case. It is often referred to as a "*prima facie* case" consisting of evidence sufficient to go to the jury. Dean Wigmore puts the test of the *sufficiency* of such evidence thus: "Are there facts in evidence which if unanswered would justify men of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain." *Wigmore on Evidence*

(1940), Vol. IX, §2494; *Weebre Steib* case, *supra*, opinion p. 169, citing Wigmore's distinction.

The precise question on this appeal is whether the fact of holding company status constitutes *prima facie* evidence of the first or second type. Appellant contends that under Section 102(b) of the applicable law (as under corresponding sections of prior law) holding company status gives rise to a presumption from which the inference of purpose to avoid surtaxes is compelled if, and only if, no evidence to the contrary is introduced.

In the leading case,¹⁰ construing virtually the same language in Section 220 of the 1921 Revenue Act as is involved here, Justice Learned Hand said:

“A statute which stands on the footing of the participant's state of mind may need the support of presumption, indeed be practically unenforceable without it, but the test remains the state of mind itself, and the presumption does no more than make the taxpayer show his hand.”

This court took a similar view of the nature of “*prima facie* evidence” in Section 102 cases in its decision in *Hemphill Schools, Inc. v. Commissioner of Internal Revenue*, *supra*.

Finally, under this point in argument the question remains whether any evidence, contrary to the presumption, was introduced by appellant. Since it will be necessary to review the evidence necessary to support appellant's general burden of proof under the third point in argument, reference is made to that portion of this brief

¹⁰*United Business Corporation v. Commissioner of Internal Revenue*, 62 F. (2d) 754, 755.

where there appears a summary of evidence amply sufficient to overcome the presumptive effect of holding company status.

There having been evidence introduced by appellant contrary to the presumption raised by holding company status, that presumption forthwith disappeared, and the case must be decided as if it never existed.

Webre Steib Company case, supra.

III.

The Trial Court's Conclusion That Appellant Has Not Proved That There Was No Purpose to Avoid the Imposition of Surtax Upon the Income of Its Shareholders Was Clearly Erroneous.

As noted before, the trial court's decision was bottomed upon the conclusion that appellant did not, by its evidence, overcome the presumptive existence of the purpose to avoid surtaxes which arose out of holding company status.

Even if the trial court erred in that respect, appellant, as proponent in the case, had the general burden of proof imposed upon any claimant against the Government. That is to say, the *facta probanda* of appellant's case were:

(a) That it paid Section 102 surtaxes to the appellee for the years in question.

(b) That the fact which is the taxable incident (the purpose to avoid surtaxes upon its shareholders by accumulating earnings during those years) did not exist.

(c) That timely claims for refund of such taxes were filed by appellant and rejected by appellee.

(d) That the taxes have not been refunded, and appellant refuses to refund them.

All the necessary facts contained in paragraphs (a), (c) and (d) were stipulated by the parties, or admitted in appellee's Answer [R. 13-14, 223, 224]. These stipulations left, as the only remaining essential fact to be proved in the case, that during the taxable years appellant's accumulations of earnings were not motivated by a purpose to avoid surtaxes upon its shareholders.

Thus whether or not the presumption dealt with in Points I and II of the argument existed, appellant's problem of proof was the same; for if appellant carried its general burden of proof, that in itself would be sufficient to destroy the effect of the presumption.

The question under this point of the argument is thus narrowed to the question whether appellant offered sufficient evidence of the absence of such purpose that the appellate court can say that the trial court's finding was clearly erroneous.

This posture of the case on appeal presents two underlying questions, the answers to which will determine whether the trial court's findings were clearly erroneous:

(1) Was the evidence adduced by appellant to prove the absence of the purpose in issue such, in the absence of any substantial evidence to the contrary, that the trier of the facts, acting as would reasonable men, must be persuaded to find for appellant on that issue?

Wigmore on Evidence (1940), Vol. IX, §2487, p. 280.

(2) Was there, in this record, any substantial evidence contrary to that in favor of appellant from which the trier of the facts could reasonably find that the purpose to avoid surtaxes existed?

If the answer to the first question is “yes,” and to the second “no,” then the trial court’s ultimate conclusion was clearly erroneous and should be reversed.

1. SUFFICIENCY OF APPELLANT’S EVIDENCE TO SUSTAIN ITS BURDEN OF PROOF.

Dean Wigmore, in describing the burden of proof which the proponent in a case must sustain, says:

“Suppose, however, that the proponent has been able to go further and to adduce evidence which if believed would make it beyond reason to repudiate the proponent’s claim,—evidence such that a jury, acting as reasonable men, must be persuaded and must render a verdict on that issue for the proponent. Here the proponent has now put himself in the same position that was occupied by the opponent at the opening of the trial, *i.e.*, unless the opponent now offers evidence against the claim and thus changes the situation, the jury should not be allowed to render a verdict against reason.”¹¹

Without going into great detail, appellant adduced the following evidence tending to prove the absence of the purpose in issue:

1. Taxpayer was not a holding or investment company. (*Cf.* Argument I.)
2. While aware of the tax effect of retaining earnings, Overton did not let that influence his conclusions [R. 54].
3. Except for a loan of five days in 1932, appellant did *not* loan its funds to its stockholders [R. 59].

Wilkerson Daily Corp. v. C. I. R., 125 F. (2d) 998.

¹¹*Wigmore on Evidence* (1940), Vol. IX, §2487, p. 280.

4. Loans *were* made by the stockholders to the corporation to finance the acquisition of assets used in the business [R. 54].

Seaboard Security Co. v. C. I. R., 38 B. T. A. 560;
Mellbank Corp. v. C. I. R., 38 B. T. A. 1108,
1118.

5. There was no transfer of personal assets such as residences, farms, automobiles, yachts, etc., to the corporation which thereby bore the expense of their upkeep [R. 55].

Regulations 103, Sec. 102-2.

6. The stockholders did not transfer any personal securities or other properties to the corporation so as to escape surtaxes upon the income therefrom [R. 55].

Mellbank case, supra, p. 1117.

7. Appellant did pay large dividends to its stockholders in the year ended August 31, 1939.¹² While the amount of these dividends was influenced by a desire to secure funds in order to purchase a ranch for the stockholders' son [R. 66], the distribution shows an indifference to the effect of dividends upon the stockholders' surtaxes since the money could have been obtained by causing the appellant to repay its loans to those stockholders.

8. Appellant's earnings and profits were not accumulated beyond the reasonable needs of its business. Despite this was a hard fought issue [R. 21, 124, 127, 129], the trial court was unwilling to find for appellee on this issue.

9. Appellant accumulated funds for the purpose of creating a reserve of liquid assets to provide for ascertainable and foreseeable needs of the business [R. 36, 99].

Lion Clothing Co. case, supra, p. 1189.

¹²*Lion Clothing Co. v. C. I. R.*, 8 T. C. 1181, 1191.

10. From sad experience appellant's officers knew the difficulties and hazards of borrowing to finance a school business. Its officers desired to accumulate funds to avoid this necessity [R. 36, 44-47].

Lion Clothing Co. case, *supra*, p. 1190.

11. During each of the taxable years in question, the bulk of appellant's original capital and accumulated earnings was already invested in tangible assets actually in use in its business. These assets were:

Land at cost	\$ 36,368.07 [R. 229]
Buildings, equipment, furniture and furnishings at cost ¹³	240,857.92 [R. 229]
	<hr/>
Total physical assets in use in business at cost	\$277,225.99
	<hr/> <hr/>

The acquisition of these facilities was originally financed out of original capital, early loans, and accumulated earnings in the following manner:

Original capital stock	\$ 50,000.00 [R. 239]
Net loans (excluding re- financing)	172,680.00 [R. 235]
	<hr/>
	\$222,680.00
Accumulated earnings	54,545.99
	<hr/>
	\$277,225.99
	<hr/> <hr/>

¹³Plant and machinery were understated by 20 cents in Stip. No. 2 [R. 237]. The total of depreciable assets at cost should be \$240,857.92 as it is in the balance sheet [R. 229].

As further earnings were accumulated over the years and the loans (except for \$35,500.00 owed the Overtons) were repaid therefrom, the surplus gradually replaced the debts in the appellant's balance sheet. [Cf. R. 230.] The source of the funds used to acquire the tangible properties used in the business then became:

1. Original capital	\$ 50,000.00
2. Earnings used to pay off loans, (\$172,680 total, less loans from Overtons of \$35,500.00)	137,180.00
3. Loans from Overtons	35,500.00
4. Other accumulated earnings	54,545.99
	<hr/>
Total tangible assets used in business	\$277,225.99
	<hr/> <hr/>

The total accumulated earnings so used were Item 2, \$137,180.00, plus Item 4, \$54,545.99, or \$191,725.99.

Thus of total accumulated earnings as at August 31, 1940 (\$213,632.92) [R. 239], \$191,725.99 were *already* at work in appellant's business. *The balance of such accumulated earnings (\$21,906.93) together with depreciation recoveries, as shown by the depreciation reserves of \$180,582.31 [R. 229] were, during the taxable years, held in the form of cash and liquid securities to provide for current liabilities and the needs set forth in Overton's financial policy memos [R. 99, 230, 257, 258]. A summary of these items is as follows:*

SCHEDULE OF ASSETS HELD TO PROVIDE FOR CURRENT
NEEDS AND CONTINGENCIES REFLECTED IN POLICY
MEMOS [R. 229-230].

<i>Assets</i>		<i>Source</i>	
Investments	\$157,093.29	Earnings not invested	
Note	950.78	in fixed assets	\$ 21,906.93
Accrued interest	805.50	Depreciation recov-	
Cash	39,679.84	eries	180,582.31
Accounts receivable	8,463.08		
Deferred expense	170.91		
	<hr/>		
	\$207,163.40		
Less amounts due on current payables:			
Accounts payable	414.16		
Property taxes pay- able	100.00		
Income taxes payable	3,700.00		
Capital stock tax payable	460.00		
	<hr/>		
Total free assets held	\$202,489.24	Source of assets held in reserve	\$202,489.24
	<hr/>		<hr/>

It is not difficult to see why the trial court was unwilling to find appellant's accumulations unreasonable.

As Overton testified, the amounts which he had set aside to cover depreciation sustained [R. 41-42] and the additional cost of replacement [R. 44] were most inadequate. These items were long-range in character but had to be considered if the difficulties of borrowing large sums were to be avoided. School buildings, equipment and furnishings are long-lived assets. When they do re-

quire replacement it takes large sums of money to finance their cost. The trial court saw the sound judgment upon which this provision was bottomed, particularly in the light of the fact that the main building alone, which originally cost \$95,178.17 [R. 229], could be replaced in 1939 and 1940 only by an expenditure in excess of \$255,188.00 [R. 116].

Besides this most important of all items, the Overtons accumulated liquid assets from earnings and depreciation recoveries for the following purposes:

(a) \$50,000.00 for working capital needed upon resumption of active conduct of academic activities [R. 41, 180]. This was done [R. 72].

(b) \$35,000.00 for modernizing the gymnasium, showers and locker rooms which were unsealed and out of date [R. 41, 57].

(c) \$15,000.00 for remodeling to eliminate the boarding department. This was done [R. 40, 178].

(d) \$20,000.00 to cover fire losses not insured and to cover the refund of tuition, payment of help, and related expenses in case the school had a serious fire [R. 38, 40, 178].

(e) \$20,000.00 to cover losses and expenses in case of earthquake, as no earthquake insurance was carried [R. 187].

(f) \$35,500.00 to repay loans made to the corporation by the Overtons [R. 187].

12. Mr. Thompson Webb, a disinterested witness and himself an owner and operator of a boys' school for many years, testified that not only was the policy of funding depreciation reserves a matter of good judgment but also that the retention of earnings by the appellant

under the circumstances in this case was “imperative” whether or not the possibility of moving the school was imminent [R. 127].

13. Mr. Morgan Adams, long experienced in the loaning business and having specific experience as the trustee of a private school, testified without contradiction as to the preferability of financing school facilities out of earnings rather than borrowing [R. 112].

We regret having reviewed all this evidence at length, but it is necessary to do so to demonstrate to this court that appellant’s proof did not consist of a few statements of its purposes for accumulating funds unsupported by independent and logical circumstances. This evidence is clear, full, uncontradicted, not extraordinary nor incredible. The record shows that there was no dispute as to the evidence, but rather as to the ultimate conclusion to be drawn therefrom. It is in this respect that appellant contends that the trial court erred in finding that evidence, as clear and of such preponderance as was here adduced, was insufficient to carry appellant’s burden of proof.

It should be remembered that this case was submitted largely upon the basis of stipulations, and the record made before Judge Hollzer. Respecting the testimony before Judge Weinberger, the most that can be said for it was, in the words of appellee’s counsel, that “nothing new developed” [R. 203].

In such circumstances this court is in just as good a position to draw the ultimate conclusions respecting purpose as was the trial court.

Compare:

Crutcher v. Joyce, 146 F. (2d) 518;

Western Union Tel. Co. v. Bromberg, 143 F. (2d) 291.

Rule 52(a) of the Federal Rules of Civil Procedure does not operate to entrench with finality the inferences or conclusions drawn by the trial court from its findings.

Kuhn v. Princess Lida of Thurn & Taxis, 119 F. (2d) 704, 705, 706;

Bach v. Friden Calculating Machine Co., 155 F. (2d) 361, 364.

Where, as here, the proponent has produced a mass of stipulated evidence and uncontradicted testimony sufficient to throw upon the opponent the duty of producing substantial evidence to the contrary, it is the duty of the trial judge to find for the proponent, if that duty is not sustained.

Wigmore on Evidence (1940), Vol. IX, §2495, p. 306.

Rather than burden the court with a less valuable discourse on this subject, we shall, as did Dean Wigmore, refer the court to the opinion of Judge Campbell, in *Jerke v. Delmont State Bank*, 54 S. D. 446, 223 N. W. 585. We believe that upon the principles stated therein, the trial court in the instant case was obligated to find that appellant had sustained its burden of proof in this case. Pertinent portions of the opinion are as follows:

“Plaintiff instituted this action to recover from defendant bank the sum of \$14,000 and interest, alleged to be the proceeds of a real estate loan negotiated by defendant bank for plaintiff. Defendant bank admitted the negotiation of the loan and the receipt of the proceeds thereof, but by way of counterclaim maintained that it was lawfully entitled to retain out of such proceeds of loan the sum of \$10,-828.80, being the amount due and unpaid upon four

certain promissory notes executed by plaintiff and owned and held by the defendant bank. * * * The case was tried to a Court and jury, and at the close of all the testimony the learned trial judge directed a verdict in favor of the defendant bank sustaining their claim of right to deduct and hold from the loan proceeds a sufficient amount to pay the notes in question, and judgment was thereon entered, and appeal taken to this Court, as a result of which appeal the judgment below was reversed; the opinion of this Court being found in 216 N. W. 362, where the facts in the case are set out at some length. * * * In our former opinion we held, in substance, first, that, fraud in the inception of the notes having been admitted, the burden of proof in the strict and proper sense of the phrase (that is, the duty of establishing conviction on the ultimate issues in the mind of the trier of the facts, as contradistinguished from the duty of advancing at any given stage of the case with the production of evidence) was upon the plaintiff to establish by a fair preponderance of the evidence that it was a holder in due course; second, that the trial judge erred in directing a verdict; * * *. We will examine first the matter of our former holding with reference to the directed verdict. The former opinion held, in substance, that it was error to direct a verdict in the light of rulings of the trial Court excluding answers to certain questions, and in the light of the \$5,000 certificate matter, and perhaps did not purport to pass squarely and definitely upon the matter of direction of verdict in this case, considered separately and apart from such additional matters; but the former opinion did purport to lay down a general rule or doctrine with reference to direction of verdicts in the following language:

“* * * Where an interested witness testified that a note tainted with fraud was purchased with-

out notice and in good faith, the jury can consider all the circumstances connected with the purchase, to determine the question of good faith. And the fact that the testimony of such witness is not directly contradicted does not justify the direction of a verdict.'

"We conceive this to be a matter of no inconsiderable importance.

"1. It is the theory of our law that the entire matter of a trial between parties shall be carried on in a court of justice and under the general supervision and control of the judge thereof, and that the truth as to the facts shall be arrived at upon a consideration of the evidence and proofs presented by the respective parties in support of their respective claims. The jury, in modern law, is merely a part of the machinery of the court, and it is the part of such machinery that is made use of in proper cases for determining the truth as to the issuable facts. But we must not forget that the general superintendence and control of the Court and all its machinery, including the jury, rests with the judge, and it is fundamental that an issue arising between litigants must be tried by a general, rational, or reasoning process, both as to the ascertaining of facts and the application of the law. This has been the basic theory of the common law ever since the rule of reason replaced trial by ordeal and wager of battle. The existence or nonexistence of ultimate issuable facts must be determined from the evidence produced in court, whether the determination is made by a judge or by a jury, by a process of rationalization and judgment, and by the application of the thinking faculties of the human mind to the evidence. We are too often prone to exaggerate the powers and privileges of a jury as a trier of facts. We frequently see the phrase, 'It is for the jury to say what the

facts are.' Historically speaking, this may have been true in the sixteenth century, but it has long since ceased to be true. The power and right and duty of the jury is not 'to say what the facts are,' but to adjudge and determine what the facts are by the usual and ordinary intellectual processes; that is, by applying the thinking faculties of their minds to the evidence received and the presumptions existing in the case, if any, and thereby forming an opinion or judgment. The data are the evidence received in court, and nothing extraneous thereto should enter into the determination, except to the extent that the sum of the past experience of any individual always and necessarily, as a matter of psychology, enters into his formation of judgment or opinion based upon any given data. Before there is anything for submission to a jury, the evidence offered as to the ultimate facts must be such that the application of normal intellectual faculties thereto might by the customary and normal processes of reasoning arrive at different judgments or conclusions. If there is not such a state of facts a verdict should properly be directed, inasmuch as any result but one would not be a reasonable result, and the direction of a verdict in a proper case is not only the right of the judge, but it is his affirmative duty, and just as much and just as proper a part of his duty as ruling upon evidence or performing any other judicial function. * * *

(At this point we state, by way of parenthesis, that in what is said herein regarding direction of verdicts we refer, of course, to civil cases. It seems to be of the spirit of our institutions that a jury in a criminal case has an inherent right to act as illogically and unreasonably and arbitrarily as to the members thereof may seem good, and this has never been more nearly brought into question than by the opinion of Mr. Justice Holmes (four justices dissenting) in

Horning v. District of Columbia (1920), 254 U. S. 135, 41 S. Ct. 53.) If reasonable minds could arrive at but one conclusion from the evidence, by applying their intellectual processes thereto, then the question as to whether the party having the burden of proof has established the issuable facts in that particular case is a question to be decided by the judge, and not by the jury. And it is probably a mere matter of phraseology and definition of terms in such a case whether we say, as a matter of language, that it then becomes a question of law for the Court, or whether we say that, being a question of fact upon which reasonable minds could not differ, it is such a question of fact as will be decided by the judge, and not by the jury, though undoubtedly the latter phrasing is more accurate.

“The only objection thereto is that it seems to conflict with the words so often used in the books since Lord Coke first quoted, ‘*Ad quaestionem facti non respondent iudices, ad quaestionem juris non respondent juratores*,’ namely, that ‘questions of fact are for the jury.’ Like most glittering generalities, this statement, to borrow the expression of Professor McBain, is ‘weak and infirm of its own generality.’ Granting that it may have been true at a time when the function of jurors was to report the facts to the Court of their own knowledge, it has not been true since the days, now more than 200 years, when it came to be the function of the jury to determine the facts by applying the reasoning processes of their minds to the evidence brought into court. Jurors do not determine all questions of ultimate fact, even in jury cases. They determine the existence or non-existence of those facts, and those only, with reference to the existence of which the judgment of reasonable men might differ as a result of the application

of their intellectual faculties to the evidence. If the proof offered by the party having the burden in support of the existence of ultimate issuable facts is so meager that a reasonable mind could not therefrom arrive at the existence of such ultimate fact, there is nothing for the jury, and the judge not only may, but should, direct a verdict against the party having the burden of proof. This is the ordinary case of directing a verdict against the party having the burden of proof, because of the insufficiency of the evidence, and with this no Courts seem to have had any difficulty. On the other hand, it is just as true that, if the party having the burden of proof offers such evidence in proof of the existence of the ultimate issuable fact that a reasonable mind functioning thereon could not escape the inference, or conclusion, or opinion, or judgment that such fact existed, then here too is left no question for the jury, and the judge should direct a verdict in favor of the party having the burden of proof. Here, also, Courts for the most part have little difficulty. The general procedure is laid down, and the language used by the courts indicated, in 26 R. C. L. 1073.

“2. A few Courts, very considerably in the minority, however, seem here to have been troubled with the matter of credibility of witnesses. The factor of credibility less frequently enters into the direction of a verdict against the party having the burden of proof, because in such cases the credibility is usually assumed, or at least not brought into question. But the entry of the factor of credibility, either one way or the other, can make no difference in the operation of the fundamental principle which necessarily underlies the direction of verdicts in all cases. The question of whether reasonable minds could arrive by reasoning processes at more than one opinion or conclu-

sion is always a question for the judge. The entry of the factor of credibility means simply the existence of one more item upon which the intellectual faculties are to operate. Of course, as the items to be reasoned upon increase in number, the likelihood of there being but one possible reasonable result mathematically diminishes; but, when that situation does exist, it should not be affected by the fact that credibility is also involved. A jury has no greater or better right to act arbitrarily or unreasonably in forming a judgment or opinion as to whether or not a witness speaks the truth than it has to act unreasonably in arriving at any other opinion or conclusion. Forming an opinion as to credibility should be just as much a process of rationalization or reasoning from the data presented in the light of human experience as the formation of any other opinion or judgment in a court, and this has always been recognized by the great majority of the courts, and the proposition, subject to various qualifications, has been laid down in some such phrasing as that 'the positive testimony of a disinterested, uncontradicted witness cannot be arbitrarily or capriciously disregarded by the jury.'

"3. Pursuing the matter somewhat further, we come to the precise question involved in the instant case, where the party having the burden of proof depends for establishing the existence of the ultimate fact, either in whole or in part, upon the oral testimony of a witness who is interested in the transaction.

"The answer to this question does not state any rule of law, but merely announces a determination of logic or reason. The only rule of law involved is that which announces that the judge will determine the matter without the assistance of the jury, when reasonable minds applied to the evidence could prop-

erly come to but one conclusion. The legal principle is simple, and the real question in every case is not a question of law in any proper sense of the word, but is a question of logic, or reason, or judgment (however we may choose to phrase it), and it is in each case a question for the judge (or for the appellate court, as the case may be), and must remain such a question, regardless of the admitted fact that there is no external standard or yardstick whereby we may determine with mathematical precision what result reasonable minds must arrive at in the field of opinion or judgment, by the application of their intellectual faculties to certain given data. The standard of reasonableness is subjective, and it is the standard of the judge that must be used; probably in the final analysis the standard of the Court of last resort in any given jurisdiction; but the nature of determination remains the same. When a Court holds in any given case or upon any given facts, that the direction of a verdict is proper, it is not in any strict sense announcing a rule or doctrine of law, but is merely announcing its judgment or opinion as a matter of reason and logic that in that case and upon those facts reasonable minds could not differ as to the result to be reached.

“4. Our question further narrows to this then: Ought a judge to say, as a matter of reason and judgment, that the mere fact that a witness is interested in the matter in controversy, in and of itself, without regard to other circumstances of the case, makes it reasonable to disbelieve or to fail to believe his testimony, in the light of general human experience? We do not believe that any Court has gone so far as to lay down any such doctrine, or enunciate any such general principle, whether it be viewed as a matter of law, or as a matter of logical rationaliza-

tion. The sound view seems to us to be this: That each case must depend upon its own facts, and that the mere fact of interest in the controversy does not, in and of itself, and apart from other circumstances appearing in the case, render it a reasonable thing to disbelieve the testimony of a witness whom otherwise it would be unreasonable to disbelieve, and this, we think, is the established practice of the great majority of courts.

“Massachusetts, which was cited in support of the doctrine enunciated in our former opinion, probably goes farther than any other Court in limiting the right of a judge to direct verdict in favor of the party having the burden of proof, where the testimony of an interested witness is involved; in other words, in holding in substance that the mere fact of interest, in and of itself, renders it reasonable to disbelieve a witness. * * * A majority of the Courts, however, have announced other views on this question, indicating in substance the view that it is not a reasonable thing to say, in general, that a witness has perjured himself or has testified falsely, either intentionally or unintentionally, merely because of an interest in the case, where his testimony is not contradicted, is not opposed to general human experience, is not inherently improbable, and is not put in question by other circumstances appearing in the case; and the majority of the Courts have held that a judge may and should direct a verdict in a proper case for the party having the burden of proof, even though the facts were established, in whole or in part, by the testimony of the party himself or an interested witness. * * *

“5. Upon principle, therefore, and upon the authorities, and upon the previous practice of this Court, we are satisfied that we erred in the former

opinion in adopting, either expressly or by implication, the doctrine of the Massachusetts Court that testimony of an interested witness always and of necessity makes a jury question. And we are satisfied that the better view, as well as the one according with the previous practice of this Court, is that the rule of reasonable judgment must be applied to each case upon its particular facts; and, if the testimony in behalf of the party having the burden of proof is clear and full, not extraordinary or incredible in the light of general experience, and not contradicted, either directly or indirectly, by other witnesses or by circumstances disclosed, and is so plain and complete that disbelief therein could not arise by rational processes applied to the evidence, but would be whimsical or arbitrary, then, and in such case, it is not only permissible, but highly proper, to direct a verdict, and the direction of such verdict should not be prevented merely by reason of the fact that one or more of the witnesses are interested in the transaction or the result of the suit."

2. SUBSTANTIALITY OF EVIDENCE TO SUSTAIN TRIAL COURT'S CONCLUSION.

The second point in this portion of the argument referred to *ante*, at page 21, is whether there is in the record any substantial evidence to support the trial court's ultimate conclusion as distinguished from its findings of fact. Admittedly, if there were in the record evidence from which the trial court could reasonably and logically conclude that the purpose existed, its conclusion should be sustained. In such case, however, the conclusion would not be bottomed upon a failure of proof by appellant.

The findings of the trial court which are pertinent to this issue were as follows [R. 27-28]:

(a) In the two years in question appellant had taxable income of \$37,337.55 and \$26,408.50, respectively, before income taxes.

(b) In the two years in question appellant paid dividends of \$17,500.00 and \$2,500.00, respectively.

(c) In 1933 appellant's surplus was \$153,927.78 and in 1940 it was \$213,632.92.

(d) As a result of accumulations of appellant's earnings during the two years in question, appellant's stockholders escaped personal surtaxes of \$2,402.99 and \$4,199.68 in the respective years.

(e) Appellant's security investments at the end of its 1940 fiscal year were \$157,093.29 at cost and had a fair market value of \$114,125.00.

(f) Of the dividends paid in 1940, appellant's stockholders used \$15,000.00 to buy their son a ranch.

(g) The properties of the school were in good repair in 1946.

(h) The properties of the school have not been substantially altered but have been modernized.

(i) The properties at present are being used for substantially the same purposes as during the taxable years in question, except that the boarding school activities have been eliminated.

These, then, are the findings of the trial court as to specific facts. Appellant here and now agrees that every one of them is correct. Admitting this, do they constitute, in the face of appellant's evidence, substantial evidence sufficient to support the trial court's conclusion? Let us examine the *substance* of these facts.

Facts (a), (b), (c) and (d) amount to this: Appellant had earnings and accumulated surplus during each of two taxable years. It distributed part of such earnings but not all of them in those years, and as a result its stockholders did not pay surtaxes which they would have paid had all the earnings been distributed. These facts and each of them are the *sine qua non* of any Section 102 case. They are true of many corporations against which no such charge is made. By themselves they signify no more than that a financial status or environment existed within which a purpose to avoid surtaxes could exist. Unaided by a presumption or some other more pertinent evidence, they mean nothing and have no substance.

Fact (e), appellant's security investments, standing unexplained, would justify an inference that a taxpayer had no reasonable need for them in its business. Appellee here so contended. However, the trial court thought the reserve which they represented reasonable because it did not, as requested by appellee, find appellant's accumulations unreasonable. Upon the record, then, it cannot be said that the ownership of these investments is substantial evidence of the purpose in issue.

Facts (g), (h) and (i), if they do anything at all, simply substantiate appellant's evidence to the effect that during the taxable years the Overtons contemplated the necessity of expending large sums to repair and modernize and to eliminate the boarding department. These facts, then, are substantial evidence in appellant's favor and are of no substance whatever in supporting a conclusion that the purpose in issue existed.

One can comb this record from end to end and, except for facts (a), (b), (c) and (d) above, find no evidence but that which supports the appellant's burden of proof. The testimony of Hugh Mann and C. G. Brown on the matter of salvage value of the school at its present site proved to be wasted effort on the part of both parties.

Giving the above facts all weight to which they were entitled, their substance is so meager that had the trial court found that they would support an inference of the existence of the purpose in issue, this court would have been justified in setting aside such finding as being against the clear weight of the evidence.

Aetna Life Ins. Co. v. Kepler, 116 F. (2d) 1, 5.

Conclusion.

Counsel are convinced that the decision in this case was conscientiously but erroneously reached by the trial court as a result of a misconception of the term “mere holding or investment company” as used in the law. Further, the court misconceived the burden of proof which appellant was required to maintain in order to prevail.

If the few meager facts upon which the trial court relies to support the imposition of this “highly penal”¹⁴ tax constitute substantial evidence sufficient to uphold its conclusion, then in all truth, taxpayers should be told that they must prove the absence of the purpose to avoid surtaxes beyond a reasonable doubt, and not by a clear preponderance of the evidence.

Respectfully submitted,

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¹⁴*United States Business Corporation v. C. I. R.*, 19 B. T. A. 809.

No. 11881
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

MARLBOROUGH CORPORATION,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for
for the Southern District of California

BRIEF FOR THE UNITED STATES.

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FILED

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No. 11881
IN THE
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FOR THE NINTH CIRCUIT

MARLBOROUGH CORPORATION,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE UNITED STATES.

Opinion Below.

The District Court wrote no opinion.

Jurisdiction.

This appeal involves federal income taxes paid for the years 1939 and 1940. The taxes in dispute were paid on July 31, 1942, as the result of the assertion of a deficiency by the Commissioner of Internal Revenue. [R. 3-4, 13, 24-26.] Claim for refund was filed on August 7, 1943, and was rejected by notice dated November 5, 1943. [R. 6, 13, 26.] Within the time provided in Section 3772 of the Internal Revenue Code and on June 28, 1944, the taxpayer brought an action in the District Court for recovery of the taxes paid. [R. 12, 27.] Jurisdiction was conferred on the District Court by Section 24, Twentieth, of the Judicial Code. The judgment was entered on August 30, 1947. [R. 30.] Notice of appeal was filed on November 25, 1947 [R. 31], pursuant to the provisions of Section 128(a) of the Judicial Code, as amended.

Question Presented.

Was the finding of the District Court that the taxpayer was availed of for the purpose of preventing the imposition of surtaxes upon its shareholders during each of its taxable years ending August 31, 1939, and August 31, 1940, clearly erroneous, under Section 102 of the Revenue Act of 1938 and the Internal Revenue Code?

Statutes and Regulations Involved.

These will be found in the Appendix *infra*.

Statement.

The facts set forth in this statement are taken from the findings of the District Court. [R. 23-28.]

The taxpayer brought this action on June 28, 1944, to recover income taxes assessed and collected under the direction of the Commissioner of Internal Revenue. [R. 23-27.]

The taxpayer, a California corporation owning school properties but having its principal place of business at 735 Roosevelt Building, Los Angeles, duly filed its income tax returns for its fiscal years ending August 31, 1939, and August 31, 1940.¹ [R. 23, 24, 25, 28.] On July 7, 1942, the Commissioner of Internal Revenue asserted deficiencies in corporate income tax of \$3,389.55 for 1939 and \$6,036.49 for 1940. [R. 24, 25.] These sums, together with interest thereon, were paid by the taxpayer on July 31, 1942, to a Collector of Internal Revenue who is no longer in office. [R. 23, 24, 25-26.] The 1939 deficiency was based upon a liability for surtaxes

¹Hereinafter the taxable years will be referred to as 1939 and 1940.

under Section 102 of the Revenue Act of 1938. [R. 24.] The 1940 deficiency, to the extent of \$924.46, was based upon the disallowance of excessive depreciation deductions in the taxpayer's return for that year, and to the extent of \$5,112.03 was based upon liability for surtaxes under Section 102 of the Internal Revenue Code. [R. 25.]

The taxpayer filed claims for refund of these taxes on August 7, 1943, and the claims were disallowed by the Commissioner on November 5, 1943. [R. 26.]

During the course of the trial taxpayer abandoned its claim for the \$924.46 tax deficiency and interest thereon, which had resulted from the disallowance of depreciation deductions for 1940. [R. 27.]

The District Court found that the taxpayer corporation was not formed for the purpose of preventing the imposition of surtaxes upon its shareholders. [R. 27.] It found, however, as a fact, that the taxpayer was availed of for the purpose of preventing the imposition of surtaxes upon its shareholders during each of its taxable years ending August 31, 1939, and August 31, 1940. [R. 27.]

In 1939 the corporation had a taxable net income of \$37,337.55 and distributed dividends amounting to only \$17,500, of which amount \$15,000 was used to purchase a ranch for the stockholders' son. In 1940 the corporation's taxable net income was determined by the Commissioner to be \$26,408.50 and in that year dividends of only \$2,500 were distributed. In 1933 taxpayer's surplus account had a balance of \$153,927.78. In 1940 it had a balance of \$213,632.92. On August 31, 1940, it had

investments in securities having a book cost of \$157,093.29 and a fair market value of \$114,125. As a result of the accumulation in the taxable years here involved, taxpayer's two shareholders avoided surtax in their personal income tax of \$2,402.99 in 1939 and \$4,199.68 in 1940. [R. 27-28.]

The court also found as a fact, that in 1946 the school properties owned by taxpayer were in good repair and had not been substantially altered since 1939 and 1940 but had been modernized. The properties were being used in 1946 for substantially the same school purposes as they had been during 1939 and 1940 with the exception that boarding school activities formerly carried on by the lessee of the properties had been abandoned. [R. 28.]

It was further found that during the two taxable years in question taxpayer conducted no substantial activities other than the management of its investments and the receiving of rentals from the lessee of the school properties, the lessee paying the taxes on the properties. However, the lease did provide for some consultations between the taxpayer and the school operator. [R. 28.]

The District Court concluded as a matter of law that the taxpayer was a holding company within the meaning of Section 102 of the Internal Revenue Code during each of the taxable years. [R. 28.]

It concluded as a matter of law that during each of the tax years 1939 and 1940 taxpayer was availed of for the purpose of preventing the imposition of the surtax

upon the income of its shareholders through the medium of permitting its earnings and profits to accumulate instead of being divided or distributed. [R. 29.]

It held that the taxpayer had not proved there was no purpose to avoid the imposition of surtax on the income of its shareholders. [R. 29.]

It then granted judgment in favor of the Government. [R. 29.]

Summary of Argument.

The District Court found as a fact that the taxpayer was availed of for the purpose of preventing the imposition of surtaxes upon its shareholders through the medium of permitting its earnings and profits to accumulate. This finding was supported by substantial evidence and was not clearly erroneous. The taxpayer was a family-owned corporation having a large surplus most of which was represented by cash and investments unrelated to the business. The taxpayer's two stockholders had independent incomes and did not require distribution of the taxpayer's earnings. During the taxable years taxpayer distributed comparatively small parts of its earnings to its stockholders and they thereby managed to avoid substantial amounts in surtaxes.

Taxpayer's controlling stockholder, a lawyer, sought to establish that although he did avoid surtaxes he did not have that purpose but was merely attempting to build corporate reserves to meet specified contingencies, most of which were set forth in contemporaneous memoranda.

The trial court could properly find, however, that: the alleged contingencies were remote and speculative; the reserves and the stockholder's explanations of them were patently unreasonable; his actions were inconsistent with his stated purpose; the memoranda were mere blinds designed to mask the taxpayer's actual purpose; the stockholder's testimony was unworthy of belief because some of his statements made under oath were obviously untrue; and the stockholder did have the purpose he denied.

The taxpayer was merely an incorporated family pocket-book which its two stockholders used as a depository for their surplus funds obtained from the taxpayer's income as lessor of a school and as loans from the stockholders. It permitted them to invest in stocks and bonds and retain the profits in the corporate treasury without payment of surtax on individual income, and to draw only such funds as were needed.

The District Court's finding that taxpayer was a mere holding company also provided *prima facie* evidence as a matter of law of the taxpayer's purpose to avoid surtax on the stockholders. This finding likewise was not erroneous.

The District Court did not make any finding as to whether the taxpayer had or had not allowed its earnings to accumulate beyond the reasonable needs of the business because it was unnecessary for it to do so. The evidence showed the taxpayer's purpose without necessity for statutory presumption.

ARGUMENT.

The Finding That Taxpayer Was Availed of for the Purpose of Preventing Surtax on Its Stockholders Was Not Erroneous.

A. THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE FINDING.

The District Court found as a fact that the taxpayer was availed of for the purpose of preventing the imposition of surtaxes upon its shareholders during each of its taxable years 1939 and 1940. [R. 27.] We submit, contrary to the taxpayer's arguments, that there was substantial evidence before the Court to support the finding and that it was not clearly erroneous.

The evidence showed that the taxpayer was a corporation engaged principally in the business of holding and renting school property to a school known as Marlborough School for Girls operated by another. [R. 21.] Although its capital was only \$50,000 it had accumulated at the end of its tax year 1939 a surplus of \$194,344.60 and at the end of 1940 a surplus of \$213,632.92. [R. 27, 230, 239.] As of such dates it had invested in securities unrelated to the leasing of its school property, \$146,493.36 and \$157,093.29,² respectively, and had remaining cash of \$19,417.09 and \$39,679.84, respectively, as well as other assets. [R. 27, 98-99, 229.] For 1939 it had taxable net income of \$37,337.55 and for 1940 it had \$26,408.50.³ [R. 27.] However, during 1939 it dis-

²Their market values were lower than what the taxpayer had put into them. At the end of 1939 they were worth \$108,245, and at the end of 1940 \$114,125.

³In taxpayer's brief (p. 4) the taxable income for 1940 is set forth as \$21,870.32. This omits the Commissioner's adjustment of \$4,538.18 for excessive depreciation which taxpayer conceded to be correct. [R. 8, 20, 27.]

tributed in dividends only \$17,500 (\$15,000 of this being used to purchase a ranch for taxpayer's stockholders' son) and in 1940 it distributed only \$2,500. [R. 27.]

The taxpayer was wholly owned by two shareholders, Eugene and Georgia C. Overton, a husband and wife, each of whom had independent income from other sources and did not require distribution of the taxpayer's income. [R. 64, 77, 83, 96, 182, 198.] Eugene Overton, who managed the financial affairs of the business [R. 36], was a practicing attorney of many years experience who had had numerous occasions to deal with tax matters and was aware that the payment of dividends by the taxpayer corporation would subject him to increased surtaxes [R. 67-68, 201]. As a result of accumulating the corporate income during the taxable years instead of distributing it, taxpayer's two shareholders avoided surtaxes on their personal incomes of \$2,402.99 in 1939 and \$4,199.68 in 1940. [R. 28, 239.]

The foregoing facts are typical of cases in which the courts have found that closely held corporations have been availed of by their stockholders to prevent the imposition of surtax upon themselves through not distributing corporate earnings. Cf. *Helvering v. Nat. Grocery Co.*, 304 U. S. 282; *Helvering v. Stock Yards Co.*, 318 U. S. 693; *Trico Products Corp. v. Commissioner*, 137 F. (2d) 424 (C.C.A. 2d); *McCutchin Drilling Co. v. Commissioner*, 143 F. (2d) 480 (C.C.A. 5th); *Semagraph Co. v. Commissioner*, 152 F. (2d) 62 (C.C.A. 4th); *R. L. Blaffer & Co. v. Commissioner*, 103 F. (2d) 487 (C.C.A. 5th); *Wilson Bros. & Co. v. Commissioner*, 124 F. (2d) 606 (C.C.A. 9th).

Taxpayer attempted to prove that even though it succeeded in avoiding surtax on its stockholders taxpayer

did not have that purpose in accumulating its income and failing to distribute more substantial dividends during 1939 and 1940. Eugene Overton testified as to certain specified needs of the business which had prompted the accumulations in 1939 and 1940. [R. 36-99, 175-200.] And as evidence of his purpose to accumulate a reserve to meet these business needs, he identified two memoranda setting forth such needs, which he claimed to have made as far back as 1937 and 1939. [R. 38, 257-259.]

The trial court was not obligated however, to accept the taxpayer's denials of the purpose to prevent the imposition of surtax on the stockholders in accumulating its income. It could find from all the evidence in the record that such was in fact its actual purpose. *Helvering v. Stock Yards Co.*, *supra*; *Helvering v. Nat. Grocery Co.*, *supra*; *Wilkerson Daily Corp. v. Commissioner*, 125 F. (2d) 998 (C.C.A. 9th).

Overton testified that one of the principal purposes of the corporation in accumulating income during 1939 and 1940 was to provide a fund for rebuilding at greater cost than that of the original buildings in the event it became necessary to move the school to another location. [R. 37, 50-51, 53, 185-186.] He claimed that a westward shift in the population from which the school drew its pupils required the school to move west. [R. 6, 50-51, 185-186.] However, Overton admitted that during the tax years at issue no tabulation as to any shifting student body had been made [R. 51, 77-80]; he did not know during the tax years nor at time of trial when such a move would

.

become necessary, where it would be, nor how much it would cost [R. 51, 53]; nor did he find it unreasonable to conclude that most of the students still came from within the area of a few blocks surrounding the school and not from any distance. [R. 80.] Taxpayer introduced no evidence that as of 1939 and 1940 the student population showed any tendency whatsoever to fall off. What evidence there was in the record showed as a matter of fact that the number of students attending the school was increasing. [R. 238.] And, as taxpayer points out in its brief (p. 6), during 1939 the corporation had its best earnings in many years.

Moreover, the evidence also showed that at any time after September 1, 1940, the lessee of the school property, under a lease which the taxpayer hoped would be renewed beyond 1942 [R. 196], had the option to buy the entire school business (other than the real estate), including the good will and the right to use its name, for a mere \$25,000 [R. 249-251]. Thus, apart from the other evidence, during 1939 and 1940 taxpayer could have hardly had even a remote or nebulous intention to invest many times that sum in new land and buildings, when if the school were successful enough to justify its continuance the lessee might well conclude to do so herself.

In 1937, Overton testified, he drew up a pencil memorandum of the business needs of the taxpayer which required the accumulation of earnings. [R. 38, 177.] This memorandum purported to show such business needs as follows [R. 257-258]:

POLICY MEMO RE RESERVE FUND.

It has been for many years and still is the purpose of the stockholders and directors of Marlborough Corporation to accumulate and establish a reserve fund in cash and/or liquid securities to provide for probable future business requirements and contingencies.

So far as can be foreseen at the present time, these probable business requirements and contingencies are believed to be as follows:

(1) Possible fire loss not compensated for by insurance, estimated at.....	\$ 20,000.00
(2) Remodeling buildings in the event it is decided to eliminate the boarding department, and for other contingencies, estimated at.....	15,000.00
(3) Additions to buildings, or new buildings that may be required, estimated at.....	35,000.00
(4) To provide for working capital if the present lease on the School should be terminated.....	50,000.00
(5) To provide for obsolescence and depreciation	67,000.00
(6) To provide for earthquake damage, as no earthquake insurance is carried, estimated at.....	20,000.00
(7) Indebtedness to Mark Overton, Georgia C. Overton and Eugene Overton	35,000.00
	<hr/>
	\$242,500.00

In order to gradually accumulate this reserve fund it is the policy to pay very moderate dividends until the reserve fund is established.

A similar memorandum drawn by Overton under date of November 7, 1939, stated however, that there was need for a reserve fund of only \$215,000. It also varied from the first memorandum in that the amount stated to be for obsolescence and depreciation was \$75,000 instead of \$67,000, and there was omitted entirely the item of \$35,500 relating to the indebtedness owed the Overtons. [R. 258-259.]

It was in pursuance of the estimated needs shown in these memoranda that the accumulations in 1939 and 1940 were alleged to have been made. [R. 38.]

The first item in the memoranda was the estimate of \$20,000 for "Possible fire loss not compensated for by insurance." [R. 257, 258.] Overton stated that this sum was intended to cover any possible total loss in excess of fire insurance. [R. 39, 178.] The testimony of taxpayer's own witnesses was however, that one of the two school buildings which would cost \$75,000 to rebuild was almost fireproof [R. 116] and that the other would cost \$255,188 to replace if destroyed [R. 115]. To meet this contingency, the evidence showed, taxpayer had \$173,285.21 in accumulated reserve for depreciation on both buildings at the close of 1939 and \$180,582.31 at the close of 1940 [R. 229], \$190,765 in fire insurance [R. 39], and \$119,000 in contingency insurance to cover the difference between original cost and any higher cost of replacement [R. 39]. In addition, there was the \$67,000 in earnings and profits alleged to have been accumulated for additional depreciation in accordance with the taxpayer's memorandum (\$75,000 in the second memorandum) [R. 257, 259], which, if truly set aside for that purpose, would likewise have been available in the event of fire loss. And the same use could likewise have been

made of the reserve for \$35,000 owed the Overtons and other items. [R. 257.] The trial court could therefore have properly concluded that the taxpayer's investment in its buildings was already adequately protected in the event of fire and the estimated need of a \$20,000 additional reserve was not in good faith.

There was set forth in Overton's memoranda the sum of \$35,000 for "Additions to buildings, or new buildings that may be required." [R. 257, 258.] Overton testified that there was included in this sum the expense of contemplated remodeling and modernizing the gymnasium but could not recall any other items. [R. 41, 179.] Under the lease in effect during 1939 and 1940 taxpayer had no power to make additions to the property. [R. 106.] But the taxpayer introduced no evidence that any new buildings or additions to buildings were even contemplated at any time. And at the time of trial no new buildings or additions had been built. [R. 41, 109, 179.]

The sum of \$50,000 was included in Overton's memoranda "To provide for working capital if the present lease on the School should be terminated." [R. 257, 259.] In his testimony Overton stated that in 1939 and 1940 he determined to accumulate this money so as to be able to use it during the summer of 1942 for minor repairs, painting and teachers' salaries if the lease should be terminated and the corporation should take over active operation of the school for the fall term. [R. 96, 179, 180, 182.] However, the evidence showed that the lessee and not the taxpayer was liable for repairs and painting at the end of the school year in 1942 [R. 72, 74, 181] and by its terms the lease was not to terminate until September of 1942 [R. 182]. What salaries were required to be paid until the tuition was collected could just as readily have

been paid from any other money set aside and needed no special reserves. Moreover, in the taxpayer's sworn claim for refund Overton stated under oath that the amount required for these purposes was only \$22,300 and not \$50,000. [R. 70-72.] And, furthermore, while in the sworn complaint Overton stated under oath that "During the years in question it was *definitely known* that the lease under which the business had formerly been operated by a lessee using her own working capital was to be terminated within a year" (emphasis supplied) and therefore, taxpayer undertook to accumulate working capital sufficient to operate the business [R. 5-6, 10], he admitted on the witness stand that during 1939 and 1940 he had no right to break the lease even if he had wanted to do so, that he had not decided whether at its expiration he would renew or terminate it and did not decide until 1942, and that he had hoped that he would be able to renew it at that time [R. 50, 75, 76, 196].

In the first memorandum Overton had included for additional depreciation the sum of \$67,000, and in the second the sum of \$75,000. [R. 257, 259.] In his testimony he explained that this item was to cover the increased cost of rebuilding the school buildings beyond the reserves for depreciation, after they had fully depreciated. [R. 41, 44, 183.] The regular reserves for depreciation on most of the property, which appeared on the books, totalled \$173,285.21 at the end of 1939 and \$180,582.31 at the end of 1940. [R. 229.] In the verified complaint Overton stated under oath that "A large part of the useful lives of the assets used in plaintiff's business, particularly its buildings, was exhausted; many of such assets were in a deteriorated condition, outmoded and insufficient in capacity and facilities for the proper con-

duct of plaintiff's business and required replacement as soon as financial and building conditions warranted." [R. 5, 9.] But according to the data produced by the taxpayer even its own books showed a remaining life for its frame school building of at least seven years and for its concrete auditorium of about 23 years. [R. 184, 237.] Overton admitted, moreover, that book depreciation reserves did not necessarily show the property was actually depreciated to that extent.⁴ [R. 52.] Taxpayer's witness Hugh L. Mann estimated that the buildings could be used for the same purposes until at least 1950 (when certain deed restrictions came into effect). [R. 139.] Worn out furnishings and fittings were required to be renewed by the lessee. [R. 242.] And even in 1946 the trial court found from its own detailed observation and examination that the school properties were in good repair, were being used for substantially the same purposes as they had been used in 1939 and 1940 and the taxpayer had even modernized them without substantial alteration. [R. 28.]

Overton conceded that during the tax years his alleged plans for replacing the buildings were never definite enough so as to warrant consulting architects or engineers as to what a new building would cost and all he knew was that it would cost more than the original. [R. 81-82.] The trial court could therefore properly find from the evidence that as of 1939 and 1940 taxpayer could have looked forward to many years more of earnings before the need for replacing its buildings would become pressing and that the taxpayer knew this to be so. Therefore the taxpayer's claimed need for accumulating earnings during

⁴As an example of this the books showed the carpets to be fully depreciated in 1939 and 1940; but Mrs. Overton admitted they were in good condition during those years. [R. 52, 103, 237.]

1939 and 1940 for replacing its buildings did not preclude an intent to prevent the imposition of surtax on the stockholders at the same time.

The \$20,000 item appearing in the memoranda, to provide for earthquake damage [R. 257, 259] was admitted by Overton not to have been based on any real estimate but was merely a guess [R. 82], and if an earthquake occurred obviously he had no way of knowing whether it would cause damage to the property of \$20,000 or 20 cents or \$200,000.

The provision for \$35,000 to pay the indebtedness owed Mark, Georgia, and Eugene Overton appears in the earlier memorandum only and not in that of 1939. [R. 257, 259.] The evidence showed, however, that this money had been owed by the taxpayer since 1925 [R. 54-55], and although the taxpayer could have repaid it at any time with cash or securities on hand [R. 62], it never did but merely renewed the debts from time to time [R. 63, 188] and continued to pay seven per cent interest on them to the Overtons [R. 62]. Overton's only explanation for this was that he wanted to keep a large bank balance in the Marlborough account. [R. 63.] Since the corporation could have had no actual need for the money but merely invested it in securities, the court could properly have concluded that the taxpayer had no real intention of accumulating earnings to pay back these loans but was using the funds in the same manner as the Overtons would have in their own name with the exception that the profits on the securities bought by the corporation were not subject to the surtax on individual income and the seven per cent interest payments were deductible by the corporation from its income.

In addition to the flaws and discrepancies shown in the explanation of the individual items in the taxpayer's memoranda, other reasons were apparent why both the memoranda and Overton's testimony thereon should not have been taken at their face values.

The sums in the memoranda were set forth as cumulative needs, for the total of which taxpayer was required to and did accumulate its earnings during 1939 and 1940. It seems evident, however, that even on their face not all the alleged needs required separate or additional allocation of funds. Thus, if the school burnt down the funds set aside for additional obsolescence and depreciation, for earthquake damage and for the Overton debts could be used for the rebuilding. The working capital for the summer renovations and teachers' salaries prior to the first year's operations after the end of the lease could be gotten from any of the other reserves and paid as a current expense from tuitions. If earthquake damage occurred it could be taken care of by unused reserves for fire loss or the additional depreciation or the Overton debts.

Overton testified that the taxpayer had followed the policy of accumulating its surplus for the purposes discussed since 1934. [R. 37, 176.] And yet if this were the case and if the corporation were anxious to build up its funds to meet the various contingencies Overton enumerated, it would not very likely have been willing to pay \$2,485 in interest each year (or almost \$25,000 since at least 1931) to its two stockholders and their son for the use of \$35,000 as loans which it did not need and which it could have repaid at any time. [R. 54, 55, 62, 188, 230.] And if its purpose were actually to strengthen its financial position it was certainly peculiar that the

Overtons were willing to pay out of corporate funds to their son upon his marriage \$5,000 because they personally had a moral obligation to him [R. 60], and that they were willing to declare and pay an extra dividend of \$15,000 in 1939 merely because they wished to buy a \$15,000 ranch for him⁵ [R. 66, 190]. Nor was it consistent with the stated purpose for accumulating the earnings for the taxpayer to invest the surplus funds in securities of a speculative nature chosen from the standpoint of whether they were liable to increase in value, their yield being merely a secondary consideration. [R. 97.]

The trial court could properly have found that the variances between some of the statements made under oath by the witness Overton in the verified complaint and the evidence produced at trial rendered his entire testimony unworthy of belief.⁶

⁵Compare the treatment of similar inconsistencies as a factor in determining the taxpayer's actual purpose in *Helvering v. Nat. Grocery Co.*, 304 U. S. 282, 292; *J. M. Perry & Co. v. Commissioner*, 120 F. (2d) 123, 125 (C.C.A. 9th); *Wilkerson Daily Corp. v. Commissioner*, 125 F. (2d) 998, 1000 (C.C.A. 9th); *Semagraph Co. v. Commissioner*, 152 F. (2d) 62 (C.C.A. 4th).

⁶In the complaint Overton stated [R. 5]:

- (1) A large part of the useful lives of the assets used in plaintiff's business, particularly its buildings, was exhausted; many of such assets were in a deteriorated condition, outmoded and insufficient in capacity and facilities for the proper conduct of plaintiff's business, and required replacement as soon as financial and building conditions warranted.

The trial court found, however, that the properties of the school were in good repair. [R. 28.] Taxpayer admits this finding to be correct. (Br. 39-40.)

In the complaint Overton stated [R. 5-6]:

- (4) During the years in question it was definitely known that the lease under which the business had formerly been

The trial court could properly have found that Overton's testimony even as to the circumstances of the drawing of the memoranda was not worthy of credence. At several places in the record he stated that the memoranda as to needs for accumulation of earnings had been drawn purely for his own satisfaction merely to verify in his own mind his conclusion that the corporation should accumulate at least \$250,000 in reserve funds and that accordingly it had not been drawn in any detail or with the thought that it would ever be made public, and if he had thought it would be made public he would have drawn it in greater detail. [R. 39, 57, 186.] He also testified, however, that they had been drawn because it was feared he and his wife might be drowned at sea and he desired to give his son a record upon which to base his actions. [R. 43, 195.] How the same memoranda could have been intended to serve both entirely different purposes was not explained.

From all of the foregoing the trial court could properly have concluded that the taxpayer's explanations for its accumulation of earnings were too patently unreasonable to be worthy of belief and that its memoranda were

operated by a lessee using her own working capital was to be terminated within a year. Plaintiff therefore undertook to accumulate working capital sufficient to operate the business on its own behalf.

At the trial he testified, however, that during the tax years at issue he was not decided whether to renew the lease or not and did not make up his mind until 1942. [R. 50, 75, 76, 196.]

In the complaint Overton stated [R. 6]:

- (5) Changing conditions and shifts in the population of Los Angeles made it advantageous and a business necessity to move rather than rebuild the school at its then location.

At trial he testified, however, that he did not know during the tax years or even at time of trial when it would become necessary to move the school. [R. 51, 53.]

merely elaborate blinds designed to mask the purpose to accumulate earnings to avoid surtax on its two shareholders.

The entire evidence before the court could amply have justified it in concluding that the taxpayer was merely a "family pocketbook" which its two stockholders used as a depository for their surplus funds obtained from the leasing of the Marlborough School and directly from the stockholders, and from which they had no occasion to draw except for specific needs. As Eugene Overton testified, he merely wanted a yield of \$1.25 per year per share. [R. 64.] It permitted the Overtons to deal and invest in stocks and bonds and retain the profits in the corporate treasury exactly as if they owned them directly but without necessity for payment of surtax on individual income. Unquestionably this is one of the things which Section 102 (Appendix, *infra*) was designed to prevent. *R. L. Blaffer & Co. v. Commissioner, supra*; *Rands, Inc. v. Commissioner*, 34 B.T.A. 1094, appeal dismissed, 101 F. (2d) 1018 (C.C.A. 6th); *Reynard Corp. v. Commissioner*, 37 B.T.A. 552.

B. THE FACT TAXPAYER WAS A MERE HOLDING COMPANY WAS PRIMA FACIE EVIDENCE OF A PURPOSE TO AVOID SURTAX ON ITS STOCKHOLDERS.

While it is submitted that the evidence fully supported the trial court's finding that the taxpayer was availed of for the purpose of preventing the imposition of surtax upon its stockholders even without the benefit of statutory presumption, further and *prima facie* evidence of purpose arises as a matter of law under Section 102 of the Internal Revenue Code (Appendix, *infra*) from the conclusion that during the tax years at issue taxpayer was a mere holding company. [R. 28.]

Section 102(b) provides:

The fact that any corporation is a mere holding or investment company shall be *prima facie* evidence of a purpose to avoid surtax upon shareholders.

Treasury Regulations 103 under the Internal Revenue Code, Section 19.102-2 (Appendix, *infra*), provide:

A corporation having practically no activities except holding property, and collecting the income therefrom or investing therein, shall be considered a holding company within the meaning of section 102. If the activities further include, or consist substantially of, buying and selling stocks, securities, real estate, or other investment property (whether upon an outright or marginal basis) so that the income is derived not only from the investment yield but also from profits upon the market fluctuations, the corporation shall be considered an investment company within the meaning of section 102.⁷

The trial court found that during 1939 and 1940 taxpayer conducted no substantial activities other than the management of its investments and the receiving of rentals from the lessee of the school properties. [R. 28.] While conceivably this finding could have given rise to the conclusion of law that taxpayer was an investment company rather than a holding company, the effect of either conclusion was the same under the statute. Either was *prima facie* evidence that the corporation was availed of for the critical purpose. The essence of the matter is that the taxpayer was not engaged in the operation of an active business.

⁷Similar provisions have appeared in the various Treasury Regulations dealing with income taxes since 1918. See, *e. g.*, Treasury Regulations 45 under the Revenue Act of 1918, Article 352.

The finding that the taxpayer conducted no substantial activities other than managing its investments and receiving rentals was supported by substantial evidence. The lessee had been operating the school since 1925. [R. 240.] The lease provided that the lessee "shall have the entire control and management of the school in all its branches and departments without interference by the Lessor." [R. 248.] Under the lease the taxpayer could not even alter or repair the property. [R. 106.] While it was true that the lease provided for certain consultations to be held between the taxpayer and the school operator [R. 28], they pertained to any fundamental changes which the lessee might have contemplated in the leased business and property which might adversely affect the taxpayer's income from the lease and the value of its property [R. 84-91, 248-249]. Both Eugene Overton and his wife had leased the school property almost immediately on their acquisition of stock ownership in 1925 [R. 36-37, 240], and could therefore hardly be assumed to be expert in its operation. Neither of the Overtons received any salary from the taxpayer for services of any kind, nor were there any other employees. [R. 198, 231.] Overton testified that he had rented to the lessee a going concern. [R. 93.] Mrs. Overton testified that the corporation had nothing to do with the upkeep of the school other than objecting to expenses. [R. 101.] Under all the circumstances the trial court could properly have concluded that the activities of the taxpayer other than holding the property and receiving its income, in addition to managing its investments, were insubstantial. Cf. *R. & L., Inc. v. Commissioner*, 33 B.T.A. 857, affirmed, 84 F. (2d) 721 (C.C.A. 5th), certiorari denied, 299 U. S. 588; *Reynard Corp. v. Commissioner*, *supra*; *Stanton Corp. v. Commissioner*, 44 B.T.A. 56, affirmed, 138 F.

(2d) 512 (C.C.A. 2d); *Rands, Inc. v. Commissioner, supra*.

The case of *Higgins v. Commissioner*, 312 U. S. 212, cited by taxpayer as a leading case (Br. 16), has nothing to do with the instant issue or statute and involved wholly different considerations.

Taxpayer argues (Br. 18) that even if it is held that the trial court properly found it to be a mere holding or investment company, the effect of such finding was merely a presumption which disappeared as soon as taxpayer offered evidence contrary to the ultimate issue involved. The argument overlooks the language of the statute which provides that the finding shall be "*prima facie* evidence." Both the Treasury Regulations (Appendix, *infra*) and the authorities have treated the *prima facie* evidence under the instant statute as evidence of the ultimate issue, which the taxpayer has the burden of disproving and which may be weighed together with all the other evidence. *Helvering v. Nat. Grocery Co., supra*; *J. M. Perry & Co. v. Commissioner*, 120 F. (2d) 123, 125 (C.C.A. 9th); *Trico Products Corp. v. Commissioner, supra*; *R. L. Blaffer & Co. v. Commissioner, supra*; *Suffolk Securities Corp. v. Commissioner*, 41 B.T.A. 1161, affirmed, 128 F. (2d) 743 (C.C.A. 2d). Taxpayer's reliance on *Hemphill Schools v. Commissioner*, 137 F. (2d) 961 (C.C.A. 9th) (Br. 19), is misplaced, since the court there was dealing merely with the presumption that the determination of the Commissioner was correct and not with a finding which the statute declares to be *prima facie* evidence. In *J. M. Perry & Co. v. Commissioner, supra*, the court appeared to regard the effect of the trial court's finding of fact sufficient to constitute *prima facie* evidence, if sustained, as conclusive on appeal.

C. DUE REGARD MUST BE GIVEN TO THE OPPORTUNITY OF THE TRIAL COURT TO JUDGE OF THE CREDIBILITY OF THE PRINCIPAL WITNESS AND TO VIEW THE EVIDENCE.

Rule 52(a) of the Rules of Civil Procedure for the District Courts of the United States provides in part:

Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

In *Wittmayer v. United States*, 118 F. (2d) 808, 811 (C.C.A. 9th), this court stated in interpreting Rule 52(a) that—

so far as the findings of the trial judge who saw the witnesses “depends upon conflicting testimony or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable.”

Similarly in *United States v. Aluminum Co. of America*, 148 F. (2d) 416, 433, the Court of Appeals for the Second Circuit held that when a trial judge has seen the witnesses—

and in so far as his findings depend upon whether they spoke the truth, the accepted rule is that they “must be treated as unassailable.” * * * and upon an issue like the witness’s own intent, as to which he alone can testify, the finding is indeed “unassailable,” except in the most exceptional cases.

In the instant appeal taxpayer argues (Br. 28) that “this case was submitted largely upon the basis of stipulations, and the record made before Judge Hollzer” and that

nothing new was developed before Judge Weinberger who decided the case after Judge Hollzer's death. But taxpayer neglects to note that in a joint pre-trial memorandum submitted at a pre-trial conference held before Judge Weinberger the taxpayer represented to the court as follows [R. 20-21]:

It is believed * * * the ultimate decision in this case must be determined by the court's opinion as to the credibility to be accorded to the witnesses Eugene Overton and Georgia Overton * * *.

Thereafter the court requested an oral statement of Eugene Overton's position. [R. 175.] And Eugene Overton restated before Judge Weinberger a considerable portion of the testimony he had given at the previous hearing. [R. 175-201.] The court did not regard such testimony as merely repetitious. It refused to agree to a stipulation striking it out and stated [R. 204]:

I don't know that I would concur in that stipulation. I have had a chance to size up Mr. Overton. I like to see a witness personally and then I get a better idea of who he is and what he is thinking about.

The trial court thus had a greater opportunity than this court to assess the credibility of the witness.⁸

Moreover taxpayer fails to mention that Judge Weinberger had before him prior to the decision of the case a fairly extensive view and inspection of the school premises.⁹ [R. 15-19.] Since the taxpayer gave as one of

⁸It has been submitted, *supra*, that even from the written record the credibility of the witness Overton is open to question.

⁹This was of course proper evidence under California law. *Gibson Properties Co. v. City of Oakland*, 12 Cal. (2d) 291, 83 P. (2d) 942; *People v. Milner*, 122 Cal. 171, 54 Pac. 833. And see 4 Wigmore on Evidence (4th ed.), Sec. 1168, and 7 Cyclopedia of Federal Procedure (2d ed.), Sec. 3292.

major reasons for the accumulations at issue a need for replacing the school buildings which were alleged to be deteriorated and whose useful lives were claimed to be exhausted [R. 5, 9], it can hardly be argued now that the court's examination of the buildings to verify whether or not taxpayer's contentions and Eugene Overton's testimony as to his purpose were in good faith was of no importance and can be disregarded by the appellate court.

D. THE TRIAL COURT HAD NO OCCASION TO FIND WHETHER THE EARNINGS WERE OR WERE NOT ACCUMULATED BEYOND THE REASONABLE NEEDS OF THE BUSINESS.

Among the taxpayer's arguments emphasis is given to the fact that the trial court made no finding that taxpayer's surplus had or had not been accumulated beyond the reasonable needs of the business. (Br. 5-6, 23.)

Whether the taxpayer was availed of for the purpose of preventing the imposition of surtax upon its shareholders through the medium of permitting its earnings to accumulate was a pure question of fact which could be determined from all the evidence. *Commissioner v. Cecil B. DeMille Productions*, 90 F. (2d) 12 (C.C.A. 9th); *McCutchin Drilling Co. v. Commissioner*, *supra*; *Olin Corp. v. Commissioner*, 128 F. (2d) 185 (C.C.A. 7th). The court was not required to find that the taxpayer had permitted its earnings to accumulate beyond the reasonable needs of its business. While this is one item of evidence which may be relevant to the ultimate factual question of the taxpayer's purpose, the court could have found such purpose even if the accumulations were not beyond the reasonable needs of the taxpayer's business. *United Business Corp. v. Commissioner*, 62 F. (2d) 754

(C.C.A. 2d), certiorari denied, 290 U. S. 635; *A. D. Saenger, Inc. v. Commissioner*, 84 F. (2d) 23 (C.C.A. 5th), certiorari denied, 299 U. S. 577; *Trico Products Corp. v. Commissioner, supra*; *R. L. Blaffer & Co. v. Commissioner, supra*.

It is true that taxpayer as a part of its case sought to explain its failure to distribute larger dividends than it did on the ground that it had contingent business needs for which it required the accumulation of earnings. But the trial court need not have made any finding thereon, because this was not enough. The trial court could have considered that a family corporation such as this could have been equally well protected against contingencies by distributing the earnings and having its stockholders rather than the corporation invest them in securities. *Helvering v. Stock Yards Co., supra*; *Helvering v. Nat. Grocery Co., supra*; *Stanton Corp. v. Commissioner, supra*; *World Pub. Co. v. United States*, 72 Fed. Supp. 886 (N.D. Okla.). Taxpayer had the burden of proving not merely reasonable, possible, or actual purposes for accumulation of its earnings but that together with all other purposes there was not consistently included to any extent, and even if not dominant, a purpose to prevent the imposition of surtax upon its shareholders. *Helvering v. Stock Yards Co., supra*; *Trico Products Corp. v. Commissioner, supra*; *R. L. Blaffer & Co. v. Commissioner, supra*; *Wilson Bros. & Co. v. Commissioner, supra*; *Whitney Chain & Mfg. Co. v. Commissioner*, 3 T.C. 1109.

The case of *Hemphill Schools v. Commissioner, supra*, decided by this court, is not inconsistent with the above. There the court reversed the holding of the Board of Tax Appeals because it had rested its decision upon the Commissioner's determination that the taxpayer had per-

mitted its earnings and profits to accumulate beyond the reasonable needs of its business but had not found whether or not this was so. There is nothing to show that here the District Court was guilty of the same error. Conceivably, in rejecting Overton's testimony that he did not have the purpose of avoiding surtax the court may have found that the accumulations during the tax years were not reasonable for the business needs, but as has been argued, it need not have arrived at its conclusion by that route at all.

It is submitted that the record provides ample support for the District Court's finding that during 1939 and 1940 taxpayer was availed of for the purpose of preventing the imposition of surtax upon its stockholders through the medium of permitting its earnings and profits to accumulate, and that the court's finding was not clearly erroneous.

Conclusion.

The judgment of the District Court was correct and should be affirmed.

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August, 1948.

APPENDIX.

Internal Revenue Code:

SEC. 102. SURTAX ON CORPORATIONS IMPROPERLY ACCUMULATING SURPLUS.

(a) Imposition of Tax. There shall be levied, collected, and paid for each taxable year (in addition to other taxes imposed by this chapter) upon the net income of every corporation (other than a personal holding company as defined in section 501 or a foreign personal holding company as defined in Supplement P) if such corporation, however created or organized, is formed or availed of for the purpose of preventing the imposition of the surtax upon its shareholders or the shareholders of any other corporation, through the medium of permitting earnings or profits to accumulate instead of being divided or distributed, a surtax equal to the sum of the following:

25 per centum of the amount of the undistributed section 102 net income not in excess of \$100,000, plus

35 per centum of the undistributed section 102 net income in excess of \$100,000.

(b) *Prima Facie* Evidence.—The fact that any corporation is a mere holding or investment company shall be *prima facie* evidence of a purpose to avoid surtax upon shareholders.

(c) Evidence Determinative of Purpose.—The fact that the earnings or profits of a corporation are permitted to accumulate beyond the reasonable needs of the business shall be determinative of the purpose to avoid surtax upon shareholders unless the corporation by the clear preponderance of the evidence shall prove to the contrary. (26 U. S. C. 1946 ed., Sec. 102.)

Section 102(a), (b), and (c) of the Revenue Act of 1938, c. 289, 52 Stat. 447, is substantially identical with Section 102(a), (b), and (c) of the Internal Revenue Code.

Treasury Regulations 103, promulgated under the Internal Revenue Code:

SEC. 19.102-2. PURPOSE TO AVOID SURTAX; EVIDENCE; BURDEN OF PROOF; DEFINITION OF HOLDING OR INVESTMENT COMPANY.—The Commissioner's determination that a corporation was formed or availed of for the purpose of avoiding the individual surtax is subject to disproof by competent evidence. The existence or nonexistence of the purpose may be indicated by circumstances other than evidence specified in the Internal Revenue Code, and whether or not such purpose was present depends upon the particular circumstances of each case. In other words, a corporation is subject to taxation under section 102 if it is formed or availed of for the *purpose* of preventing the imposition of surtax upon shareholders through the medium of permitting earnings or profits to accumulate, even though the corporation is not a mere holding or investment company and does not have an unreasonable accumulation of earnings or profits; and on the other hand, the fact that a corporation is such a company or has such an accumulation is not absolutely conclusive against it if, by clear and convincing evidence, the taxpayer satisfies the Commissioner that the corporation was neither formed nor availed for the purpose of avoiding the individual surtax. All the other circumstances which might be construed as evidence of the purpose to avoid surtax cannot be outlined, but among other things the following will be considered: (1) Dealings between the corporation and its shareholders,

such as withdrawals by the shareholders as personal loans or the expenditure of funds by the corporation for the personal benefit of the shareholders, and (2) the investment by the corporation of undistributed earnings in assets having no reasonable connection with the business. The mere fact that the corporation distributed a large portion of its earnings for the year in question does not necessarily prove that earnings were not permitted to accumulate beyond reasonable needs or that the corporation was not formed or availed of to avoid surtax upon shareholders.

If the Commissioner determines that the corporation was formed or availed of for the purpose of avoiding the individual surtax through the medium of permitting earnings or profits to accumulate, and the taxpayer contests such determination of fact by litigation, the burden of proving the determination wrong by a preponderance of evidence, together with the corresponding burden of first going forward with evidence, is on the taxpayer under principles applicable to income tax cases generally, and this is so even though the corporation is not a mere holding or investment company and does not have an unreasonable accumulation of earnings or profits. However, if the corporation *is* a mere holding or investment company, then the Internal Revenue Code gives further weight to the presumption of correctness already arising from the Commissioner's determination by expressly providing an additional presumption of the existence of a purpose to avoid surtax upon shareholders, while if earnings or profits are permitted to accumulate beyond the reasonable needs of the business, then the Code adds still more weight to the Commissioner's determination by providing that irrespective of whether or not the corporation

is a mere holding or investment company, the existence of such an accumulation is *determinative* of the purpose to avoid surtax upon shareholders unless the taxpayer proves the contrary by such a clear preponderance of all the evidence that the absence of such a purpose is unmistakable.

A corporation having practically no activities except holding property, and collecting the income therefrom or investing therein, shall be considered a holding company within the meaning of section 102. If the activities further include, or consist substantially of, buying and selling stocks, securities, real estate, or other investment property (whether upon an outright or a marginal basis) so that the income is derived not only from the investment yield but also from profits upon market fluctuations, the corporation shall be considered an investment company within the meaning of section 102.

Article 102-2 of Treasury Regulations 101, promulgated under the Revenue Act of 1938, is substantially identical with Section 19.102-2 of Treasury Regulations 103.

No. 11881

IN THE .

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

MARLBOROUGH CORPORATION,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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IN THE

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MARLBOROUGH CORPORATION,

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vs.

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Appellee.

APPELLANT'S REPLY BRIEF.

If the trial court had actually found the facts which appellee says it *could* have found, this appeal would never have been taken. The cold fact is that most of the findings which appellee imputes to the District Court are those which appellee desired and urged upon the Court, but which it declined to adopt.

At the trial appellee urged the Court to find that taxpayer's earnings were accumulated beyond the reasonable needs of its business [R. 21]. The Court did not so find, even though the statute¹ makes this test a crucial one in such cases.

¹Section 102(c) I. R. C. and Revenue Act of 1938.

Appellee asserts that the Court affirmatively found that taxpayer was availed of for the purpose of avoiding surtaxes on its shareholder, implying that the Court's finding was based upon direct evidence of such purpose (Brief, pp, 3, 6). The Court did no such thing, for if it had, it would have been entirely unnecessary for the Court to have bottomed its conclusion upon so-called holding company status, or upon the conclusion that appellant had not proved that there was no purpose to avoid surtaxes [R. 29].

Appellee repeatedly suggests that the District Court's findings were the result of its disbelief of the principal witness, Eugene Overton (Brief, p. 24 *et seq.*). The record and particularly the Court's findings are bare of any indication that it found any of the testimony incredible.

It would unduly burden this brief, to no useful purpose, to haggle over all the many inferences which appellee urges this Court to assume that the trial court drew from the evidence. To show that the trial court would have repudiated their authorship, we shall expose the fallacies in the more important inferences which appellee would have this Court attribute to the District Court.

I.

Substantiality of Evidence Supporting the Finding of Purpose to Avoid Surtaxes.

Referring to evidence that appellant was engaged in renting school property; that it had earnings and surplus at the end of each of the taxable years involved; that it owned securities; that it distributed only part of its earnings as dividends; that its stock was closely held; that its stockholders had income independent of that of their corporation; that the stockholders realized that the receipt of dividends would cause them to pay surtaxes; and that the stockholders did not have to pay surtaxes upon the earnings not distributed as dividends, appellee asserts that these facts are typical of cases in which the section 102 surtax has been imposed, citing cases.

As pointed out in our opening brief (p. 40) the facts to which appellee gives such significance do no more than establish the financial climate within which the interdicted purpose *could* exist. They are of no substance in establishing that such purpose *did* exist.

They are, as appellee says (Brief p. 8), "typical," but they are typical of any one of thousands of corporations against which there has never been a penny of section 102 surtax asserted. They are not typical of the situations in the cases cited by appellee. In those cases not only was the financial atmosphere present, but there were other factors present which established the existence of the purpose as distinguished from the bare possibility of its existence.

In the cited cases:

(1) The Courts found earnings to have been accumulated beyond the reasonable needs of the business. *Helvering v. National Grocery Co.*, 304 U. S. 282, 285; *Helvering v. Chicago Stockyards Co.*, 318 U. S. 693, 697; *Wilson Bros. & Co. v. C. I. R.*, 124 F. (2d) 606, 609; *Trico Products Corp.*, 137 F. (2d) 424, 426; *McCutchin Drilling Co. v. C. I. R.*, 143 F. (2d) 480, 482.

(2) The Courts found that loans were regularly made to the stockholders for their personal use. *National Grocery Co.*, *supra*; *Chicago Stockyards Co.*, in the Board of Tax Appeals, 41 B. T. A. 590, 622; *Wilson Bros. & Co.*, *supra*; *McCutchin Drilling Co.*, *supra*.

(3) The Courts found that the stockholder transferred profit-yielding assets to the corporation to escape the personal taxes thereon and to produce deductible losses in their personal returns. *Chicago Stockyards Co.*, *supra*, Board of Tax Appeals opinion, 41 B. T. A. at 622; *R. L. Blaffer & Co.*, 103 F. (2d) 487, 488; *Wilson Bros. & Co.*, *supra*; *Semagraph Co. v. C. I. R.*, 152 F. (2d) 62, 64; and in *McCutchin Drilling Co.*, *supra*, the Court found that the corporation's funds were used to finance drilling operations conducted and purchases made by the stockholder (Opinion, p. 482).

(4) The Courts found in many cases that no dividends at all had been paid. *Semagraph Co.*, *supra*, p. 64; *R. L. Blaffer & Co.*, *supra*, p. 488; *Wilson Bros. & Co.*, *supra*, p. 608; *McCutchin Drilling Co.*, *supra*, p. 482; *National Grocery Co.*, *supra*, p. 294.

(5) The Courts found that investments in securities were beyond the need for any "conceivable expansion"

(*National Grocery Co.*, *supra*, p. 294); that the securities owned had been transferred to the corporation to escape tax on the dividends therefrom (*Chicago Stockyards Co.*, *supra*, Board of Tax Appeals, opinion, p. 622); that the securities held by the corporation were moved in and out of the corporation at will and for the purpose of establishing loss deductions on the shareholders' personal returns (*R. L. Blaffer & Co.*, *supra*, p. 488); that the securities were purchased by the corporation with funds "contributed" by the stockholders in order to transfer the earnings therefrom from their personal returns to the corporation (*Wilson Bros. & Co.*, *supra*, p. 608).

All of these activities were "typical" of the cases cited by appellee, but not a single one of them is typical of the activities carried on by appellant (See Opening Brief, pp. 22-28).

In none of the cases cited by appellee were the securities owned by the corporation earmarked to cover sustained depreciation and known needs, as was the case here (See Opening Brief, pp. 25-28). Appellee says these needs, as testified to by Overton, were "remote and speculative," "obviously untrue," "mere blinds," (Brief, p. 6), "too patently unreasonable to be worthy of belief" (Brief 19).² The District Court did not think so, because though such a finding was put in issue and requested by appellee [R. 4, 9, 13, 14, 21, 124], the Court did not find the ownership of the securities, for the purposes here in evidence, beyond the needs of the business. If the Court below

²In passing, it may be noted that these are serious accusations. Appellee accuses Overton, a man of high professional and civic standing in the community for many years, of perjury.

found anyone's contentions incredible, therefore, they were appellee's, not appellant's.

Typical also of the inferences which appellee says must be imputed to the trial court (and of which it declined authorship) is the one on page 12 of appellee's brief in which it attacks the reasonableness of Overton's provision for possible fire losses. The simple addition of \$190,765 ordinary insurance and the \$119,000 contingency insurance, and the deduction of the replacement cost of the main frame building, \$255,188, does not render the provision of \$20,000 for uninsured fire losses illusory.

In the first place, the ordinary insurance was 90% co-insurance [R. 39]. Obviously if the insurer was obligated to indemnify the taxpayer to the extent of \$190,765, then taxpayer had to be prepared to bear 10% of that amount, or \$19,076.50, which is the \$20,000 provided for that purpose. The contingent insurance covered only the *excess* of current costs over original costs, not the total of original costs [R. 39].

Secondly, appellee ignores the fact that the \$20,000, so provided, was to cover not only actual property loss, but also the necessary incidents thereof such as refunding of tuition, paying teachers who were under contract, and such items [R. 40].

Another inference urged by appellee, which the trial court declined to father, was that set forth in appellee's brief, pages 15-16, wherein it attacks the provision setting aside liquid assets for the purpose of funding accumulated depreciation. As it has done throughout the history of this case, appellee insists on treating depreciation reserves (\$180,582.31 at the end of 1940) as if they were assets which could be used to meet business needs. A

depreciation reserve is *not* an asset. It is a credit item in a balance sheet which simply reflects, in terms of dollars, the loss of useful value of a depreciable asset based on its original cost. Not a single board, nail, or stick of furniture can be bought with depreciation reserves. What such reserves do signify, as appellant urged and the lower court understood, is that a specific portion of the cash and securities on the asset side of the balance sheet represents a recovery, over the years, of the sums originally expended to acquire the depreciable property used in the business (See Opening Brief, p. 26). So, we should be talking about reserved assets, not depreciation reserves. The \$67,000 and \$75,000 amounts set aside in liquid assets as a replacement fund to cover accumulated depreciation were not only clearly inadequate for that purpose [R. 43, 44] but if used for some other purpose would become even more inadequate. Moreover, a remaining life of seven to ten years (See Appellee's Brief, p. 15) provides very little time to make up an asset-deficiency of the difference between \$75,000 and \$255,188 [R. 166], the cost of replacing the main frame building.

Nor does the fact that the properties were in "good repair" in 1946 (after the repairs and remodeling expenses incurred by the corporation upon resuming possession of the school) [R. 205-221] imply that their useful lives had been extended by a day. No one should know better than appellee's counsel that the Bureau of Internal Revenue classifies repair expense as expense which preserves but does not restore the useful life of the property.

The reference to the state of good repair which the Court made in its findings has significance only in that it corroborates the testimony of appellant's witness that ex-

traordinary repairs to the properties were anticipated in 1939 and 1940 [R. 82, 103, 179]. It does not signify that the main building, then some 30 years old, had sustained no substantial depreciation. The trial court did not find these provisions unreasonable, and there is no justification for appellee's suggested inference that they were.

Appellee's attitude regarding the \$35,000 owed the Overtons has a peculiar inconsistency which shows why the trial court thought the existence of this loan did not imply what appellee says it did. On pages 12 and 13 of its brief, appellee says that the funds set aside to pay the debt to the Overtons were available for fire loss contingencies. On pages 16 and 17 of its brief, appellee argues that the corporation could have paid these debts at any time. Now clearly if the funds were used to pay the debts, they would not be available to meet contingencies. Appellee should ride horses going in the same direction.

Appellee argues (Brief, p. 16) that the earmarking of \$35,000 to pay the debts to the Overtons is not entitled to consideration because they could have been paid off at any time. This is the type of prestidigitation which appellee considers sound financial policy. The trial court could see, if appellee could not, that if the assets earmarked for the payment of the debts were distributed as dividends, they would not be available to pay the debts.

We presume appellee would suggest that the dividend money could then be loaned back to the corporation to be used to pay off the Overton debts, since that is what ap-

pellee suggests could be done with assets set aside for other purposes. That sounds foolish? Well, it's appellee's idea of an inference which the District Court could have drawn.

On page 27 of its brief, arguing the lack of necessity for accumulating earnings for its business needs, appellee says that "the trial court could have considered that a family corporation such as this could have been equally well protected against contingencies by distributing the earnings and having its stockholders rather than the corporation invest them in securities."

How the trial court must have savored the prospect of drawing the brilliant deduction that the way for a corporation to provide for its business obligations and needs is to distribute its liquid assets as dividends so that it will be forced to increase its obligations by borrowing those assets back! Clearly, in declining to find these provisions for the needs of the business unreasonable, the trial court showed that it would not be a party to so foolish an inference.

Curiously, while appellee says this is what appellant should have done with regard to dividends, it takes precisely the opposite view with respect to the interest paid the Overtons on their loans (Brief, p. 17). Both dividends and interest bear personal surtaxes. If dividends could be loaned back to strengthen the corporation's finances, why was the payment of interest any different? If the corporation had *not* paid interest on the loans, appellee would

be arguing that this was done to avoid surtaxes on the interest to which the Overtons were entitled.

The fact that the corporation pursued ordinary everyday business practices in *both* respects apparently has a sinister aspect to appellee that the trial court did not appreciate, for it found nothing unreasonable in the loans which the Overtons had made years before to help pay the cost of the original buildings [R. 55-58].

Appellee also urges that the satisfaction of a moral obligation to Mrs. Overton's deceased mother has sinister implications. We need say no more than what the trial court said in pursuing the point during Overton's examination.

"The Court: In other words, if that was the provision of the will or whatever the estate provision was relative to that bequest, the assets were burdened with it? A. Morally burdened with it." [R. 189.]

Perhaps it is too much to expect the Government to understand a moral burden, but ordinary people, unfortunately, have to live with their moral burdens.

Appellee insists (Brief, p. 20) that appellant was a "family pocketbook." But the circumstances to which that term has been applied in the cases cited by appellee are absent here. There were no "wash sales" or sales to the corporation by the stockholders to effect deductible personal losses, as was the case in *R. L. Blaffer & Co.*, *supra*.

There were no transactions whereby the stockholders here bought from and sold to the corporation; nor did they transfer their *own* securities to the corporation so as to shift the income thereof to the corporation; nor did they transfer large amounts of personal funds to the corporation each year without interest; there was no holding of the corporation's assets in the stockholders' names; nor was appellant *formed* to act as a holding company, all of which were present in *Rands, Inc. v. C. I. R.*, 34 B. T. A. 1094, cited by appellee.

Nor was appellant simply a corporate device to contract for and receive compensation for the personal services of a highly paid cartoonist; nor were most of the stockholders' income-producing assets transferred to the corporation; nor did the corporation purchase personal residences for the stockholders to live in; nor did the corporation pay for life insurance on the stockholder's life, all of which circumstances were considered significant in *Reynard Corporation v. C. I. R.*, 37 B. T. A. 552, cited by appellee.

In the instant case there was a complete absence of transfers of assets between the appellant and its stockholders, except for the loan to appellant in 1925 to re-finance the loan made from Mortgage Guarantee Company, the five day loan of \$1,000 to Mrs. Overton in 1932; and the payment of dividends and interest to the stockholders. If appellant was a "corporate pocketbook," its hinges were pretty rusty.

II.

Appellant's Status as a Mere Holding or Investment Company.

The trial court found:

“During the two taxable years in question, plaintiff conducted no substantial activities other than the *management* of its investments and the receiving of rentals from the lessee of the school properties. The taxes upon the school properties were paid by the lessee under the terms of the lease. This lease also provided for certain *consultations* between plaintiff and the school operator.” [R. 28.] (Emphasis ours.)

The regulations cited by appellee (Brief p. 21) refer to a holding company as one which has “practically no activities except holding property, and collecting the income therefrom or investing therein.” An investment company is one which invests in properties not only for the income yield but also for the profits from market fluctuations.

Now admittedly appellant did the thing described in the regulations. But the *management* of appellant's investment in the Marlborough School, including the “consultations” provided for in the lease, goes considerably farther than the mere holding of property.

Appellant has no quarrel with the trial court's finding, quoted above. The precise point is that the use, by the Court, of the terms “management” and “consultations” discloses a realization by the Court that appellant's activities constituted something substantially more than the passive holding of property and the receipt of rentals. It is the legal conclusion [R. 28] to which exception is taken.

Two questions are raised by the Court's Conclusion No. I.

First, the Court concluded as a matter of law that appellant was a “holding company” but it did not conclude that it was a “mere holding company.” Upon this distinction of the *prima facie* evidence depends. The law gives rise to *prima facie* evidence only if the corporation is a mere holding company—not if it engages, among other things, in holding properties. *Olin Corp. v. C. I. R.*, 42 B. T. A. 1203, 1214.

Second, the finding that appellant engaged in management activities with respect to the school properties and business precludes, in itself, a legal conclusion that appellant was merely holding its properties in the passive sense used in the statute and regulations.

Appellee attempts to brush off the holding of the Supreme Court in the *Higgins v. Commissioner*³ case by saying that the circumstances there did not involve the instant statute.

We agree, that case did not involve section 102; but it did involve the question whether, for federal tax purposes, the renting and management of real estate constitute the mere holding of investments, or the carrying on of an active business. The Supreme Court held that the latter was the case and permitted the deduction of expenses which would not have been deductible except for the reason that they were incurred in carrying on a trade or business.

Third, the supervisory powers specified in the lease [R. 199, 248] and reserved to protect the participation of appellant in the profits from the operation of the school give added force to the proposition that the term “management” as used by the District Court in its findings meant something more than “mere” holding or investing.

³12 U. S. 212.

III.

Holding or Investment Company Status as Prima Facie Evidence.

Appellee's brief, page 23, discloses that it misperceives appellant's argument. Appellant does not contend that the *fact* of holding company status, if it existed, disappeared upon the introduction of contrary evidence, but that its effect as *prima facie* evidence (i.e., the inference which is compelled in the absence of contrary evidence) disappears.

The Supreme Court in *Webre Steib Co. v. C. I. R.*, 327 U. S. 164, at 171, stated that upon the introduction of contrary evidence the "presumption" derived from the fact, not the fact itself, disappears and the case is to be decided as if there "had never been any presumption."

The fact itself remains, but the inference of purpose is no longer compelled. At this point it becomes evidence which would permit the inference of purpose, unless such an inference would be clearly unreasonable and erroneous. Cf. *Wigmore on Evidence* (1940), Vol. IX, §2494. It was appellant's purpose, in citing the cases and opinion of Judge Campbell, on page 29 of its Opening Brief, to point out that on this record the evidence introduced by appellant by way of testimony, exhibits and stipulations, was so clear, full, uncontradicted and unextraordinary that the trial court erred in finding that appellant had failed to sustain its burden of proof even if taxpayer was a holding company.

The point is that once contrary evidence is introduced and the effect of a fact as *prima facie* evidence disappears, it is just ordinary evidence, to be considered with other evidence bearing upon the ultimate question. To thereafter give it the effect of compelling the inference appellee desires would be error, because under the law it no longer has that effect.

We do not interpret the Court's decision in *J. M. Perry & Co. v. C. I. R.*, 120 F. (2d) 123, as holding that after the fact loses its effect as *prima facie* evidence it nevertheless compels the inference which would follow if no contrary evidence had been introduced. To do so would throw the decision in the *Perry* case into conflict with the authorities cited above, including the Supreme Court. We interpret that decision as holding that on the record in that case the evidence showing unreasonable accumulations, loans to stockholders and others, the building of residential buildings, and sales transactions with its stockholders were affirmative evidence of the existence of the proscribed purpose.

The nub of this particular issue in the instant case is that the trial court did give the fact of holding company status the *compelling* effect which the authorities say it does not have.

IV.

**Absence of Any Finding That Appellant's Earnings
Were Unreasonably Accumulated.**

While the trial court was not required to find whether appellant's earnings were accumulated beyond the reasonable needs of its business, its unwillingness to do so in the instant case has particular significance.

Aside from the fact that the statute makes this fact an important test in such a case, the fact was put in issue by the pleadings and in the Joint Pre-Trial Memorandum [R. 21]. The testimony from end to end was directed largely toward the exploration of this question. It was the most important question in the briefs of the parties below, and appellee's brief shows the extent to which the Government still relies upon its view of this question.

In spite of all this, the Court after reviewing the testimony, particularly that of Morgan Adams and Thompson Webb, declined, though vigorously urged by appellee, to find these accumulations unreasonable.

Naturally appellee wishes to deprive appellant of the evidentiary value of the fact that its provisions for the obligations and needs of its business were regarded as reasonable by the trial court. But does it stand to reason that where so important and so warmly contested an issue consumed the bulk of the time and record in this case the trial court would have registered its determination by saying nothing?

If the Court had thought the provisions made by appellant for its business needs unreasonable, would it not have been grossly derelict in its duty to have failed to find such to have been the fact?

The bald fact is that as regards the matter of the accumulation of liquid assets for the purposes testified to by appellant's witnesses, the Court agreed with those witnesses; and appellee's efforts to persuade this Court that the District Court *could* have found otherwise and that it found the testimony of those witnesses incredible is pure wishful thinking on appellee's part.

Surely this Court is not going to agree with appellee that the trial court committed so naive and Brobdingnagian a boner as that.

It is not necessary to compute the sum of two plus two by differential calculus. While, in order for it to be a *fact of record*, the trial court was required to find appellant's accumulations unreasonable, the simple significance of the Court's not finding that fact is that it found them reasonable. Or if we simply say that the trial court did not find appellant's financial policies unreasonable, that alone fortifies the good faith with which they were pursued.

Conclusion.

It must be apparent that the many inferences attributed by appellee to the trial court are neither those which that Court would have espoused nor are they inferences which reasonable men would draw from the evidence.

It is clear that due to small but important errors in construing the law the trial court:

1. Concluded that appellant was a holding company under the law.
2. Concluded that that fact established a *prima facie* case for appellee.
3. Concluded that appellant had not produced evidence sufficient to overcome the *prima facie* effect of holding company status, and had therefore not proved its case.

Rule 52(a) does not operate to entrench with finality the conclusions drawn by the trial court from its findings. *Kuhn v. Princess Lida of Thur & Taxis*, 119 F. (2d) 704; *Bach v. Friden Calculating Machine Co.*, 155 F. (2d) 361.

Respectfully submitted,

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No. 11,883

IN THE
United States
Court of Appeals
For the Ninth Circuit

HAROLD B. BLAKE,

Appellant,

vs.

W. R. CHAMBERLIN & Co.,
a corporation,

Appellee.

APPELLEE'S REPLY BRIEF

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Appellee.

APPELLEE'S REPLY BRIEF

PRELIMINARY STATEMENT

The "Statement of the Case and Summary of the Evidence" contained in appellant's opening brief, together with a great majority of the arguments set forth therein, seem to have been framed on the erroneous assumption that appellant is entitled to a trial *de novo* on his appeal herein. Lest this false premise (coupled with the fact that the proceedings below were initiated with the filing of a "libel") mislead the Court, we wish to emphasize the

fact that, although these proceedings originated in admiralty, the cause was subsequently transferred to the *law* side of the District Court, so that appellant seaman might have the benefit of a trial by jury.¹

Under such circumstances all intendments are, of course, in favor of the judgment on the verdict and, in reviewing the evidence, this Court will take as true all facts which appellee's evidence tends to establish and will draw in its favor all inferences fairly deducible from such facts, without regard for the countervailing proof offered on behalf of appellant.

United States v. Klever (9 C.C.A., 1937) 93 F.2d 15.

Accordingly, we feel that the statement of the case presented at pages 5 to 20, inclusive, of appellant's brief (colored as it is by a great mass of conflicting testimony which must be ignored on this appeal) is so argumentative and inadequate that the Court will welcome the following statement of the facts as they must be deemed to have been found by the jury.

STATEMENT OF THE CASE

This was a seaman's action for negligence and for maintenance and cure (Cl. T., pp. 1-8). Although initiated in admiralty, the cause was subsequently transferred to the law side of the court, at plaintiff seaman's request, and tried before a jury (Cl. T., pp. 19-20). Verdicts were returned for defendant on each count and judgment was entered accordingly (Cl. T., pp. 35-38). Thereafter, plaintiff's motion for a new trial was denied and he noticed this

1. Appellant's opening brief, p. 2. Cl. T., pp. 19-20.

appeal (Cl. T., pp. 44-45). The facts, as the jury must be deemed to have found them,² are these:

Plaintiff Blake is an intelligent, well-educated man. He is a high school graduate, was in the Navy (where he studied electrical and diesel engineering), was foreman in a manufacturing plant, graduated from Maritime School and held a marine engineer's license (R., pp. 22, 172, 179, 182).

On June 18, 1943, Mr. Blake, age 33 years, signed on the Franklin K. Lane as Third Assistant Engineering Officer for a foreign voyage (R., p. 25). On October 2, 1943, while the vessel was at Calcutta, Blake complained to the Second Mate that he had diarrhea. He was given medicine, which he failed to continue taking; nevertheless his condition improved and he had no temperature. On the morning of October 7, the Master inquired as to his condition. Mr. Blake stated that he was "O.K." and went ashore. Upon his return to the vessel at 5:45 P.M., he was running a temperature and exhibited other symptoms of illness. He was given medicine. He refused to go to the hospital. At 10:30 P.M. the Master ordered that an ambulance be called and that Mr. Blake be sent to a United States Army hospital. Upon his arrival at the hospital, Mr. Blake's case was diagnosed as pneumonia (R., pp. 416, 531-2).

Previous to the date when he was sent to the hospital, Mr. Blake had exhibited no signs of illness to his fellows aboard the vessel (R., pp. 268, 388). He stated that he had not made his illness (if any) known to his fellow

2. *United States v. Klever*, *supra* (9 C.C.A., 1937) 93 F.2d 15; *Galeota v. United States Gypsum Co.* (2 C.C.A., 1941) 123 F.2d 947, 948.

officers and that he had worked regularly up to the day when he was taken to the hospital (R., pp. 31-2, 105). There has been no contention that there was any unseaworthy condition aboard the vessel which could either have caused or contributed to Mr. Blake's illness.

The vessel continued on her voyage and paid-off at Baltimore on December 9, 1943 (R., p. 494). After hospitalization at Calcutta and Bombay, Mr. Blake was repatriated aboard a hospital ship, arriving at San Pedro on February 8, 1948. He immediately reported to the United States Public Health Service at Los Angeles, becoming an out-patient (R., p. 447). After examining him, a Public Health Service doctor told Mr. Blake he had a "spot on the lung" (R., p. 114).

Mr. Blake called at the office of Mr. Murray Roberts, legal representative for defendant's underwriters, on March 13, 1944. At the beginning of the interview, Roberts asked Blake if he wished to be represented by counsel. Blake said he did not (R., pp. 444, 446). At that time, Robert's only information concerning Blake's case was contained in a copy of an entry in the vessel's log book; so he took a statement from Blake (R., pp. 446, 493). Roberts told Blake that he was entitled to his wages to the end of the voyage and to maintenance money for a reasonable time thereafter, irrespective of negligence (R., p. 526). He also told Blake that if he felt that his illness was occasioned by any negligence or by any unseaworthiness of the vessel, he could retain counsel and file suit (R., p. 446, 525-6). Blake stated that such was not the fact and signed a statement to that effect (R., p. 446).

Because of his uncertainty as to his condition, Blake was not interested in discussing settlement at that time. Roberts gave him an advance on maintenance and suggested that Blake get a medical report from the United States Public Health Service and also arranged for a medical examination by Dr. Schroeder (R., p. 447).

The certificate which the Public Health Service furnished to Blake and which he brought to Robert's office is Plaintiff's Exhibit #7 in evidence. The diagnosis stated therein was: "Lung abscess, left lower lobe; hernia, rt. femoral, incomplete; under observation for lt. femoral hernia." The certificate stated further that Blake would have to continue treatment for an indefinite period and that the prognosis was "Guarded."

Dr. Schroeder reported that Blake had suffered from lobar pneumonia with secondary lung abscesses; that he should be given a further trial of conservative therapy; that a phrenic crushing of the left side would not be of much help, although it could be tried. He was inclined to believe that a selective pneumothorax would be of more benefit. He felt that a diagnosis of tuberculosis was improbable, but that tests should be made for it. It was his opinion that healing would be slow and that Blake would probably be disabled for four to six months at least³ (R., pp. 449-50). Dr. Schroeder's findings and conclusions were read to Blake by Roberts (R., p. 447).

At the time Dr. Schroeder's findings and conclusions were read to him, Blake told Roberts that he was inter-

3. Dr. Schroeder did not believe that Blake had a hernia, and so stated in the report which was read to Blake by Roberts (R., pp. 449-50). That his conclusion was correct seems indisputable, in view of the fact that there has been no showing that the "hernia" has ever required any medical treatment.

ested in settling his case and made Roberts an offer of settlement in the sum of \$1,500, exclusive of two months wages that were due him to the termination of the voyage and the advances that had been given him. This offer was accepted by Roberts' principles and settlement, in the sum of \$2,130.00, was effected on May 23, 1943 (R., pp. 451, 455). As a part of the settlement Blake read and signed a "release of all claims and demands" (R., pp. 451, 528, 673-677). This release is Defendant's Exhibit G in evidence (R., pp. 452-454).

(For the convenience of the Court, a specimen copy of the release has been set opposite. The Court will note that it is made clear and unambiguous by the use of red and black type, blanks to be filled in with typewriter and pen, and the use of enlarged type in places. We submit that the jury could only have concluded that plaintiff Blake had full notice and knowledge of what he was signing and that his testimony that he thought he was giving a receipt for wages was unworthy of belief.)

We have made every effort to set forth the above statement of the facts, as we believe the jury must have found them, without embellishment, reserving the inferences that might be drawn therefrom for argument. However, in view of appellant's argumentative and contentious "Statement of the Case and Summary of the Evidence" we feel justified in pointing out at this time the conclusions which the jury were entitled to draw from the evidence placed before them:

To all in whom these presents shall come or may concern, greeting:

Known ye, that I, WAROLD B. BLAKE

the undersigned, for and in consideration of the sum of Two Thousand One Hundred Thirty and no/100 Dollars (\$2,130.00)

the receipt whereof is hereby acknowledged, have remised, released and forever discharged and by these presents do for myself, my heirs, executors, administrators, and assigns, remise, release and forever discharge

V. B. Chamberlin & Company and
United States of America, acting by and through the Administrator, War Shipping Administration, and its
General Agents and Agents under Service Agreements, Berth Agents and Sub-Agents acting on their
behalf, and Owners and in particular the vessel SS "FRANKLIN K. LAKE"

its engines, boilers, tackle, apparel and furniture, its owners, operators, charterers, lessees, managers, officers, and crew, and each of them and all persons, firms and corporations having any interest in or to said vessel, of and from any and all claims and demands of any and every kind, name, nature, or description, and from ANY AND ALL DAMAGES, injuries, actions or causes of action, either at law, in equity, or in admiralty, which I now have or in the future may have against it or them or any of them, including any and all claims or demands for wages, maintenance, cure, compensation, reimbursement, transportation, sustenance, or expense under any law or duty imposed by any law of the United States of America, or any State thereof, or for any other account, whether or not the same be now existent or known to me or whether it injuries sustained by me on or about the 5th day of September, 1943, while in the employ of said vessel and/or its owners and/or its agents at Calcutta and Bombay, India

when the undersigned sustained bilateral hernias and developed pneumonia, lung abscesses and other lung diseases and other severe illnesses.

The undersigned does hereby affirm and acknowledge that he has read over the foregoing Release and has had the same fully explained to him and fully understands and appreciates the foregoing words and terms and their effect, and being entirely satisfied with the settlement herein made, has affixed his signature hereto voluntarily and of his own free will and accord.

Witnessed by:

Murray A. Roberts

Harold B. Blake

FULL RELEASE OF ALL CLAIMS

Do you understand that signing this paper settles and ends EVERY claim for DAMAGES, as well as for compensation, maintenance, cure and wages? Answer: Yes

(Claimant may write here either "yes" or "no," according to his understanding.)

Dated Wilm., Calif., May, 1944.

W-558 (1-1-44)

Harold B. Blake

FULL RELEASE OF ALL CLAIMS



(1) Blake was not coerced into making a settlement. He had from March 13th until May 23rd in which to consider the matter. The offer of settlement was made *by him* and the settlement was concluded on *his* terms.

(2) The consideration was more than adequate. Blake was paid the sum of \$1,500.00 in consideration of the release. In addition to this sum he received his wages to the termination of the voyage, repatriation bonus and maintenance money to the date of settlement.

(3) Blake was fully apprised of his physical condition at the time of settlement. The United States Public Health Service doctor had told him that he had a "spot on the lung." This agency had furnished him with a certificate which stated that he had a lung abscess, that he would have to continue under treatment for an indefinite period and that the prognosis of his case was "guarded." He had been advised, further, that it was Dr. Schroeder's opinion that radical therapy might be necessary and that, although a diagnosis of tuberculosis was improbable, tests should be made for it.

(4) Blake had been fully advised as to his legal rights in the matter and had had ample time in which to retain counsel, if he so desired. More than two months before the date of settlement, Roberts had asked Blake if he wished to retain counsel and had informed him as to his rights with respect to negligence, unseaworthiness and maintenance.

(5) Blake was not over-reached. He was aware of his legal rights and of the medical opinion concerning his case. He and Roberts acted on identical information. Neither of them had any reason to suppose that Blake

had any legitimate claim based on negligence and the facts developed at the trial clearly showed that he did not. Nor did it appear that the sum of \$1,500.00 was insufficient to provide Blake with maintenance during the period of his probable disability, based on the medical opinion concerning the case at the time of settlement.

(6) Blake understood the consequences of signing the release. He was an intelligent, well-educated man and the jury could not help but conclude that when he read and signed the release, Blake knew that he was waiving each and every claim which he might have against the defendant.

We submit that, on the basis of all the evidence, the jury properly concluded:

“Here is no case of a seaman in extremis pressed into a half understood agreement, which takes away an undoubted right. Here is a case of a matter in controversy, negotiations in regard to which, protracted over a considerable space of time in an atmosphere not of overreaching and double dealing, but of frankness and plain dealing, finally resulted in a settlement with nothing really set up to defeat it except the claim which of course may not avail, that one side obtained a better bargain than the other.”

Harmon v. United States (5 C.C.A., 1932) 59 F.2d 372, 373.

ARGUMENT

I.

There Is Nothing Before the Court on This Appeal

(a) THE RELEASE, HAVING BEEN RECEIVED IN EVIDENCE WITHOUT OBJECTION, WAS NOT SUBJECT TO A MOTION TO STRIKE.

Appellant complains that the trial court erred in denying his motion to strike out the release. At the time the release was offered in evidence, the following colloquy occurred (R., pp. 451-452):

Mr. Hoge: We offer this in evidence as Defendant's Exhibit next in order.

The Court: Any objection?

Mr. Resner: I have no objection.

The Court: It may be received and appropriately marked.

(Thereupon the statement referred to was received in evidence and marked Defendant's Exhibit G.)

Where evidence is admitted without objection, a motion to strike is properly denied.

Evans v. Johnston (1896) 115 Cal. 180, 183-4;

Estate of Loucks (1911) 160 Cal. 551, 559;

Churchill v. More (1906) 4 Cal. App. 219, 224;

Oakland Barge Etc. Co. v. Foster (1914) 25 Cal. App. 193, 198;

Denver-Laramie Realty Co. v. Wyoming Etc. Co.
(8 C.C.A., 1915) 219 Fed. 155, 159.

There is, of course, an exception to the rule where counsel has not had an opportunity to object prior to the reception of the evidence. Such obviously was not the case here. Counsel for plaintiff certainly was forewarned that the release would be offered in evidence, inasmuch as it

was set up as an affirmative defense in defendant's answer, and a copy of the release was attached thereto as an exhibit (Cl. T., pp. 16-17). Nevertheless, counsel for plaintiff specifically stated that he had no objection to the reception of the release in evidence. Under these circumstances, we submit, if the trial court erred in permitting the release to be received in evidence, such error was induced by counsel for plaintiff, who cannot now be heard to complain.

(b) THE TRIAL COURT'S DENIAL OF PLAINTIFF'S MOTION TO SET ASIDE THE JURY'S SPECIAL FINDINGS CANNOT BE CONSIDERED BY THIS COURT.

Appellant specifies as error the trial court's order denying his motion to set aside the jury's special findings. There are several answers to this contention:

First, this Court is one of limited jurisdiction and the order complained of is not appealable under the statute from which it derives its powers (28 U.S.C.A. 225).

Second, it does not appear that counsel for plaintiff made any request that the jury be instructed to disregard the release. Therefore, he is precluded from raising the point on this appeal.

F.R.C.P., Rule 51, 28 U.S.C.A. foll. section 723c.

Third, where special issues are submitted to the jury without objection, plaintiff cannot complain on appeal that the jury's findings on such issues are opposed to the great weight and preponderance of the evidence.

Mitchell v. Swift & Co. (5 C.C.A., 1945) 151 F.2d 770, 772.

In the case at bar counsel for plaintiff not only failed to object to the submission of the special issues on the question of the release, but they were submitted *at his request* (R., p. 461):

Mr. Resner: I should like a special finding on the release.

The Court: Will you frame that?

Mr. Resner: I will.

(c) THE TRIAL COURT'S ORDER DENYING PLAINTIFF'S MOTION TO SET ASIDE THE VERDICT, JUDGMENT THEREON AND FOR A NEW TRIAL IS NOT REVIEWABLE BY THIS COURT.

As pointed out, *supra*, the release, having been received in evidence without objection, was not subject to a motion to strike. Plaintiff could, however, have requested a peremptory instruction to the jury to disregard the release. This he did not do. Nor did he move for a directed verdict. Instead, he requested that special issues be submitted to the jury on the question of the release (R., p. 461). With the record in such a state, no question of law is presented on this appeal.

Maryland Casualty Co. v. Talley (5 C.C.A., 1940)
115 F.2d 807.

As was stated in

Baten v. Kirby Lumber Corporation (5 C.C.A., 1939) 103 F.2d 272, 274,

“Federal appellate courts do not directly review jury verdicts but only rulings of the judge which may have affected the verdict. Rule of Civil Procedure 50, 28 U.S.C.A. following section 723c, does not do away with but emphasizes the necessity of a motion for a directed verdict to raise the legal question whether the evidence is sufficient.”

Thus where special issues are submitted to the jury without objection, the findings on such issues are not reviewable on appeal.

Mitchell v. Swift & Co. (5 C.C.A., 1945) 151 F.2d 770, 772.

In

Flint v. Youngstown Sheet & Tube Co. (2 C.C.A., 1944) 143 F.2d 923, 924,

the court passed upon a situation closely analagous to that at bar as follows:

“The first point raised by the appellants, namely, that the verdict is not supported by the evidence is not open to them upon this record. At the conclusion of the evidence, when the plaintiffs rested, the defendant moved for a directed verdict, but the plaintiffs did not. Nor did they do so after the defendant had rested. When the verdict came in, they moved for a new trial on the ground that the verdict is ‘contrary to the evidence, and without evidence to support it.’ This motion was denied, and, when later renewed, was again denied. But such denials are of no avail to them. *In a federal court the denial of a motion for a new trial brings up nothing for review in an appellate court.* (citations) *If the plaintiffs wished to assert that there was no case to go to the jury, they were bound to move for a directed verdict.* They may not take a verdict and then complain that it is not what they expected; or at least their right to complain ends with the trial judge. (citation) Under federal practice an appellate court will not consider the question of the sufficiency of the evidence in the absence of a request for an instructed verdict.” (Italics added)

Accord,

Al G. Barnes Amusement Co. v. Olvera (9 C.C.A., 1946) 154 F.2d 497, 499;

Benton v. United States (4 C.C.A., 1935) 80 F.2d 162.

Assignments that the trial court erred in entering judgment on the verdict, in that the verdict was against law and unsupported by the evidence, and in denying a motion for a new trial present nothing for review.

Inland Power & Light Co. v. Grieger (9 C.C.A., 1937) 91 F.2d 811, 818.

(d) NO ERROR IN INSTRUCTING THE JURY IS BEFORE THE COURT.

Plaintiff complains of the following "instruction" set forth at page 39 of his opening brief, without reference to the transcript:

" 'Regardless of what may be your personal views as to which party to the contract derived the greater advantage, if there was as a matter of fact any greater advantage obtained by either side or, in other words, regardless of which party you may find to have *obtained the greater advantage by said contract*, if either party did, said release is binding if you find from the evidence that there was no *failure of consideration for the execution* of such release and that the plaintiff assented to the same and that he was not coerced into entering into said agreement through misrepresentation, fraud, mutual mistake, undue influence or duress.' "

Plaintiff's argument as to the propriety of such instruction is meaningless and must be ignored, since the record shows that *no such instruction was given to the jury!* We

are confident that opposing counsel will acknowledge that his incorporation in the brief of a nonexistent instruction and argument thereon was an inadvertent error.

Plaintiff complains of two more "instructions," also set forth at page 39 of his opening brief. A diligent search on our part has revealed two paragraphs in the trial court's charge which are somewhat similar to, but by no means identical with the second and third paragraphs "quoted" in counsel's brief (R., pp. 725-726). Thus we are confronted with the unique situation where counsel for plaintiff complains in his brief of three "instructions," the first of which was not given at all and the second and third of which appear in the record in a form substantially different from that set forth by appellant. We submit that under these circumstances there is nothing before the Court, insofar as instructions are concerned.

An exception to instructions must be stated with sufficient particularity to advise the trial court of the particular error which is being complained of. Plaintiff's exceptions to instructions concerning the release are unintelligible to us (R., p. 734, line 24—p. 735, line 15). We assume they were equally baffling to the court below. If they can be deemed as specifying any particular error, it is only with respect to the "instruction" that was *not given*. Therefore, no error in instructions can possibly have been preserved.

F.R.C.P., Rule 51, 28 U.S.C.A. foll. section 723c;

Palmer v. Hoffman (1943) 318 U.S. 109, 63 S. Ct. 477, 87 L.ed. 645.

(e) NO ERROR IN THE REFUSAL TO ADMIT CERTAIN LETTERS IN EVIDENCE IS BEFORE THE COURT.

Counsel for appellant specifies as error the trial court's refusal to receive in evidence two letters (R., p. 583). No foundation was laid upon which the offer of these letters in evidence could have been predicated. Counsel did not attempt to identify the letters by any witness. In fact, no witness was on the stand at the time the offer was made (R., p. 582, line 15—p. 584, line 1). Under such circumstances, the trial court would have erred *had it admitted* the letters in evidence, inasmuch as a letter or telegram which has not been authenticated does not constitute competent evidence.

People v. Frank (1924) 193 Cal. 474.

(f) NO ERROR WITH RESPECT TO THE OFFER OF ANY EVIDENCE BY APPELLEE IS BEFORE THIS COURT.

The contention that defendant erroneously was allowed to offer certain misleading and incorrect evidence is absurd on its face: First, the payroll voucher and the official log book were received in evidence without objection (R., p. 531, 682-A). Second, any statement made by counsel does not constitute evidence, and the jury were so advised (R., p. 705, lines 20-22). Third, if counsel for defendant was in error in stating that Blake was paid his "earned wages" after his return to the States, this error may well have been induced by plaintiff and his counsel, who had both made similar statements somewhat earlier in the trial (R., p. 667, lines 3-25). Fourth, and most important, the *date* of payment was immaterial, it was the *fact* that payment had been made that was relevant, and that fact stands admitted.

II.

The Trial Court Did Not Err in Submitting the Release to the Jury**(a) PRELIMINARY.**

As we have pointed out, plaintiff evidently supposes that the Court is in a position to weigh the evidence and to reverse a judgment founded on a verdict against the weight of credible proof, but such is not the case in the United States Courts. A federal appellate court may only upset a verdict for failure of proof where the verdict is without substantial evidence to support it.

Galeota v. United States Gypsum Co. (2 C.C.A., 1941) 123 F.2d 947, 948.

In determining whether the evidence supports a judgment on a verdict, this Court will consider only the evidence most favorable to appellee, with every inference of fact that might be drawn therefrom. Assignments that the trial court erred in entering judgment on the verdict, in that the verdict was against law and unsupported by or against the weight of the evidence, and in denying a motion for a new trial present nothing for review.

Inland Power & Light Co. v. Grieger (9 C.C.A., 1937) 91 F.2d 811, 813, 818.

It is thus established that, even had appellant preserved a proper record in the court below, the only issue with respect to the release open to review in this Court would be whether or not there was sufficient evidence to justify the submission of the question of the validity of the release to the jury. We submit that, were such issue properly before the Court, it could not be resolved in favor of appellee.

(b) THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE VERDICT.

Appellant opens his argument with the following statement: "It seems to us to be abundantly clear that the case turned upon the release taken from Mr. Blake. The jury did not even consider the question of negligence or additional maintenance for Mr. Blake * * *" (Ap. op. br., p. 21). In our opinion there is no merit to this contention.

The jury were instructed that a seaman is entitled to maintenance as of right, without regard for negligence and that the right continues after the voyage for a reasonable time in which to effect such improvement in the seaman's condition as reasonably may be expected (R., p. 721). They were instructed that the burden of sustaining the release was on the defendant and that they were to consider the following factors in determining its validity or invalidity: (1) The sufficiency of the consideration. (2) The medical advice given to the plaintiff. (3) The legal advice given to plaintiff as to his rights with respect to negligence and to future maintenance. (4) Whether plaintiff was over-reached, i.e., was the settlement made with plaintiff fair in all respects? (5) Whether Mr. Roberts made the full, fair and complete disclosure, with respect to plaintiff's rights, required of a fiduciary. And (6) whether there were grounds for reasonable difference of opinion as to the question of the liability or non-liability of the defendant to plaintiff for damages or for maintenance (R., pp. 722-5).

We submit that if the jury followed these instructions (and we must assume that they did follow them) they necessarily passed on the questions of negligence and additional maintenance. How else were they to determine

the sufficiency of the consideration, the adequacy of the medical and legal advice, whether the settlement was fair to plaintiff in all respects, and whether Mr. Roberts had fulfilled his role as fiduciary?

If it be deemed that the jury did not consider the questions of negligence and additional maintenance, then the trial court did so. Rule 49(a) provides that if in submitting special issues to the jury "the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, *it shall be deemed to have made a finding in accord with the judgment on the special verdict.*

F.R.C.P., Rule 49(a), 28 U.S.C.A. foll. section 723c.

It was plaintiff who asked that the special issues with respect to the release be submitted to the jury (R., p. 461). Accordingly, he cannot now be heard to complain that the jury failed to find on all of the material issues.

Inasmuch as we have set forth, in our Statement of the Case, the material facts as they must be deemed to exist on this appeal, we do not feel it necessary to comment extensively on appellant's version of them. However, we are perplexed by counsel's mathematics in arriving at the conclusion that Mr. Blake was paid only \$900.00 for the release. He asked for \$1,500.00, plus two months' wages and his maintenance to the date of settlement. That is exactly what he received, the total being \$2,130.00. Upon what theory counsel contends that he received \$900.00 for the release, instead of the \$1,500.00 which he was paid,

we cannot understand. Whatever rights Blake had to future maintenance were waived in consideration of the settlement.

Counsel for appellant relies heavily on *Garrett v. Moore-McCormack Co.* (1942) 317 U.S. 239, 63 S. Ct. 246, 87 L.Ed. 239. We have no quarrel with the principles enunciated therein. In the *Garrett* case the Supreme Court had no occasion to pass upon the validity of a release. The sole question decided was that state courts were bound to follow the long-established admiralty rule that the burden of sustaining the validity of a seaman's release is on the defendant. In describing the nature of this burden, the Court said:

“We hold, therefore, that the burden is upon one who sets up a seaman's release to show that it was executed *freely, without deception or coercion, and that it was made by the seaman with full understanding of his rights.* The adequacy of the consideration and the nature of the medical and legal advice available to the seaman at the time of signing the release are *relevant* to an appraisal of his understanding.” (63 S. Ct. 252)

We submit that the defendant in the case at bar has more than sustained the burden imposed upon it. It is obvious that Blake executed the release freely and without deception or coercion. He was not rushed into concluding a settlement. He first saw Roberts on March 13th and the settlement was not concluded until May 23rd. The offer of settlement came from Blake, after he had had ample time to consider the matter and settlement was concluded on his terms. He was told that he was entitled to his wages to the end of the voyage and to maintenance money for a reasonable time thereafter, without regard to negligence.

He was also told that if he felt his illness was occasioned by unseaworthiness of the vessel, or by negligence, he could retain counsel and file suit. He stated that such was not the fact. There was no occasion for Roberts to give Blake a detailed explanation of the word "unseaworthiness." Nothing in Blake's statement to Roberts suggested that the vessel was unseaworthy and no such contention was made at the trial. Nor did Roberts have any information either from Blake or from the vessel which would lead him to conclude that there had been any negligence in failing to render Blake proper medical care. Certainly there was no showing of such negligence at the trial. Mr. Blake's testimony that he did not have a full understanding of his rights at the time of settlement went to his credibility as a witness, was contradicted by other evidence and the jury were not bound to believe him.

The jury were certainly justified in finding that the consideration paid to Blake was adequate. He received \$1,500.00 over and above his wages to the end of the voyage and his maintenance money to the date of settlement. He was fully advised of his physical condition at the time of settlement. The United States Public Health Service doctors had diagnosed him as having a lung abscess. Their certificate stated that he would have to continue treatment for an indefinite period and that their prognosis was *guarded*. Dr. Schroeder's diagnosis was substantially in accord with that of the Public Health Service doctors. It was his opinion that Blake should be given a further trial of conservative therapy, but that certain radical procedures might be tried. It was his opinion, further, that healing would be slow and that

Blake would be disabled for *at least* four to six months. Blake was fully informed as to these diagnoses and opinions at the time he made his offer of settlement.

We submit that the evidence clearly supports the jury's verdict. As was said in *Harmon v. United States* (5 C.C.A., 1932) 59 F.2d 372, 373:

“While the record would easily support a finding that in releasing his claim appellant did not act wisely, it does not at all appear therefrom that he was either mentally or physically incapacitated from fully understanding and appreciating what he deliberately did. On the contrary, a careful reading of the record permits no other view than that appellant thoroughly understood the contents of the instrument which he signed, was well advised of all the facts and circumstances, including the state of the medical opinion as to his case, and well knew the consequences of its signing. *Here is no case of a seaman in extremis pressed into a half understood agreement, which takes away an undoubted right. Here is a case of a matter in controversy, negotiations in regard to which, protracted over a considerable space of time in an atmosphere not of overreaching and double dealing, but of frankness and plain dealing, finally resulted in a settlement with nothing really set up to defeat it except the claim which of course may not avail, that one side obtained a better bargain than the other.* (Italics added)

The *Harmon* case was cited by the Supreme Court in the *Garrett* case.

In *Sitchon v. American Export Lines* (2 C.C.A., 1940) 113 F.2d 830, 832-3, also cited in the *Garrett* case, plaintiff seaman suffered a head injury. He was treated at the

Marine Hospital and employed an attorney who negotiated a settlement for the sum of \$180.00, for which the seaman gave a release, covering all injuries *known and unknown* for which the defendant might be liable. After the settlement was concluded, plaintiff was examined by another physician. The examination showed a fractured skull which was bound to result in permanent disability. Plaintiff employed another attorney and brought action. Defendant pleaded the release and moved for *summary judgment*, which was granted by the trial court. In affirming the judgment the appellate court declared:

“When a seaman has made a settlement after full investigation and with independent advice, we can see no ground for holding it invalid. The question *in any case* is whether the seaman, *if he is acting alone, has intelligence enough fully to understand the situation and the risk he takes in giving up the right to prosecute his claim* or whether, if he is acting under advice, that advice is disinterested and based on a reasonable investigation. * * * Each party entered into a settlement based on identical information and conducted in the fairest manner.” (Italics added)

In *Johnson v. Andrus* (2 C.C.A., 1941) 119 F.2d 287, 288, the Second Circuit again upheld the validity of a seaman’s release, stating:

“We need not consider the original validity of Johnson’s claims, because we agree with Judge Hincks that whatever they were, he released them with full knowledge of what he was doing, and for an adequate consideration, satisfactory to himself.

* * * * *

“Scrutinize this transaction as one will, if the finding is accepted, there was not a shadow of overreaching

in its procurement, to set it aside would in effect deny to seamen the freedom to settle their controversies upon their own terms, which, as we said in *Bonici v. Standard Oil Company*, supra, would serve in no sense to protect them, but on the contrary would force them to a suit in every case.”

We submit that this language is directly applicable to the case at bar. If the defendant’s evidence is accepted, as it must be on this appeal, to set aside the release would be to declare all seamen’s releases invalid and to force them to suit in every case.

This Honorable Court had occasion to review the action of the trial court in upholding the validity of a seaman’s release in *Stetson v. United States* (9 C.C.A., 1946) 155 F.2d 359. There (as here) appellant argued that the District Court erred in finding that the seaman had executed the release with a full understanding of his rights. The court held that the findings were supported by substantial evidence, not clearly erroneous and hence should not be disturbed.

Ames v. American Export Lines (D.C., S.D.N.Y., 1941) 41 F. Supp. 930, was a case where the plaintiff admitted signing a release, but claimed (as does appellant) that he thought it was merely a receipt for wages. There was no charge of any misrepresentations by the defendant. A motion to dismiss the complaint was granted.

Schlitzkus v. U.S.A. (D.C., S.D.N.Y.) 1948 A.M.C. 688, is pertinent in that the form of release upheld therein was identical with the one in the instant case, and the circumstances surrounding its execution were closely analogous to those before the Court. Libellant was injured aboard

ship and was hospitalized. After his repatriation he went to the office of the steamship company where he made a statement concerning the details of his accident and injuries. After some negotiations he signed the release in return for \$1,090.69. He was unrepresented by counsel, was an out-patient at the Marine Hospital and was examined by a company doctor. Both the Marine Hospital doctor and the company doctor gave him an estimated disability of six months. It later developed that libellant had suffered some permanent disability as a result of the accident. The court concluded that libellant was aware of the extent of his injuries and understood what he was doing when he signed the release. In commenting on the release the court said:

“The release is made clear and unambiguous by the use of red and black type and by filling in blanks with typewriter and pen, and the use of enlarged type in places. The release was made as plain and understandable to one when it was presented for signature as human and legal ingenuity could make it.

* * * * *

“Certainly libellant had full notice of and full knowledge of what he was signing.

“*The fact that libellant was without a lawyer to counsel him, alone is not enough to set aside this release in view of all the facts and circumstances disclosed.*” (1948 A.M.C. 691-2)

Montilla v. United States (D.C., E.D.N.Y., 1946) 70 F. Supp. 181 and *Muruaga v. United States* (D.C., S.D.N.Y., 1948) 77 F. Supp. 848, are each cases wherein a seaman gave a release and then subsequently discovered that he was permanently disabled. In each case the court found

no negligence, noted that the right to maintenance and cure continues only for a reasonable time, and upheld the validity of the release.

We submit, on the basis of the foregoing authorities, that not only was there ample evidence in the instant case to justify submission of the question of the validity of the release to the jury, but the facts and circumstances were such that a failure to do so would have been error.

We now address ourselves to the cases cited by appellant as holding seamen's cases invalid:

United States v. Johnson (9 C.C.A., 1947) 160 F.2d 789, was before this Court as a trial *de novo*. Libellant was struck on the head by a falling block and brought action for negligence under the Jones Act and for maintenance and cure. Respondent pleaded a general release. In holding the release invalid the Court tested its validity by the standard set by the Supreme Court in the *Garrett* case and found that, at the time he signed the release, libellant had no understanding either of his legal rights or of his current physical condition. (He believed himself recovered when in fact he was not.) Although respondent's agent admitted that, at the time the release was signed, he had in his possession information which indicated that libellant had a possible right of action under the Jones Act, he told libellant nothing of this information or of his rights under that Act; nor did he suggest that libellant consult a doctor or an attorney. Under such circumstances the release was clearly invalid.

We submit that there is no analogy between the *Johnson* case and the instant case, as appellant suggests. Blake was asked if he wished to retain counsel. He was told that he had an absolute right to his wages to the

end of the voyage and to maintenance for a reasonable time thereafter. He was advised that if he felt that his illness had been occasioned by any negligence or unseaworthiness of the vessel, he could retain counsel and file suit. He was sent to an independent doctor (at the United States Public Health Service) and to Dr. Schroeder for medical reports. Hence, he was fully aware of his physical condition and of his legal rights when he signed the release. Furthermore, the *Johnson* case was a trial *de novo*, wherein the Court was privileged to weigh the evidence.

The case at bar is not controlled by *Bay State Dredging Co. v. Porter* (1 C.C.A., 1946) 153 F.2d 827. There the release was obtained in consideration of payments to be made in accordance with a state Workmen's Compensation Act. Defendant's agent had made no attempt to advise the plaintiff of his rights under the maritime law. In fact, the agent, himself, had only the foggiest notion of what those rights were. The release taken was marked "preliminary release." The agent, as well as plaintiff, was under the impression that eventually there was to be a full and final release upon the payment of a lump sum, subsequently to be agreed upon.

King v. Waterman S.S. Co. (D.C., S.D.N.Y., 1945) 61 F. Supp. 969, does not aid appellant. It was merely the denial of a *motion for summary judgment* by defendant steamship company, wherein the court held that there should be a trial of the issues, at which the defendant would have the burden of sustaining the release. In the case at bar there has been such a trial and the release has been sustained by verdict of a jury.

Stuart v. Alcoa S.S. Co. (2 C.C.A., 1944) 143 F.2d 178 was in admiralty. The trial judge had held the release not binding, saying: “ ‘* * * a release means practically nothing in a case of this kind’ and ‘where we find the amount which was paid was inadequate, the court will disregard it.’ ” The appellate court noted that the trial judge had over-stated the law of seamen’s releases but affirmed because it appeared that the seaman had had no independent medical or legal advice and had been advised by the company doctor that his injury was not disabling. Again it must be noted that here was a case where the court was *affirming* a judgment, not reversing it. In our case, Blake had had independent medical advice and had been informed of his legal rights.

In *Stanley v. Weyerhauser* (S.F. Super. Ct.) 1947 A.M.C. 411, defendant’s representative concededly made no attempt to explain to plaintiff the rights accorded him under the Jones Act, and the court, sitting without jury, concluded that the sum of \$60.00 paid in consideration of the release was inadequate in the light of all the circumstance shown.

In the *Stanley* case the court was sitting as *trier of fact*, not as a court of review, hence it was privileged to draw such inferences as it saw fit. No mention had been made to plaintiff of the fact that he might have a right of action for negligence.

The Henry S. Grove (D.C., Md., 1927) 22 F.2d 444, is not in point. There the injured longshoreman was being paid in installments, and releases were taken periodically. This procedure was obviously designed to deceive. Each release taken was identical in form with the previous ones,

so that there was nothing to distinguish the "final" release from the others.

In *Bonici v. Standard Oil Co.* (2 C.C.A., 1939) 103 F.2d 437, the seaman signed a release because of advice given to him by the respondent's doctor to the effect that there was nothing wrong with his injured arm. He had *no* independent medical advice.

Hume v. Moore McCormack Lines (2 C.C.A., 1941) 121 F.2d 336, was an appeal from an order granting *summary judgment* to defendant who had pleaded a release as a bar to a seaman's claim. In reversing, the court held:

"*There should be a trial of the issues, on evidence, at which the burden will be on the appellee to sustain the release 'as fairly made with and fully comprehended by the seaman.'*" (121 F.2d 347, italics added)

This is a concise statement of the rule for which appellee is contending in the case at bar, to wit, that the validity or invalidity of the release is a question of *fact* which was properly left to the jury.

III.

The Trial Court Did Not Err in Instructing the Jury

As we have pointed out in section I(d) of our argument, *supra*, the trial court did not give the "instruction" to which appellant directs his argument. Furthermore, the second and third instructions "quoted" at page 39 of appellant's opening brief were not given in the form therein set forth (compare R., p. 725, line 20—p. 726, line 10). Nor does it appear that any exception was taken to these instructions (R., p. 734, line 24—p. 735, line 15). In any event the instructions were not erroneous, it being

well settled that a seaman may give a valid release of all claims and demands.

Stetson v. United States (9 C.C.A., 1946) 155 F.2d 359;

Johnson v. Andrus (2 C.C.A., 1941) 119 F.2d 287.

IV.

The Trial Court Did Not Err in Refusing to Admit Evidence

Plaintiff complains that the trial court erred in refusing to admit certain letters in evidence. We have shown, section I(e), *supra*, that no foundation was laid upon which the admission of these letters could be predicated. The letters had nothing to do with the settlement with Blake. He wrote to Mr. Rowse asking about defendant's insurance coverage, not about its liability to him. Furthermore, there was no showing that Rowse had either the requisite knowledge or authority to make representations to Blake, on behalf of defendant, as to his rights under the maritime law. The letters were properly excluded in that they referred solely to insurance and would have been highly prejudicial.

Dam v. Lake Alise Riding School (1936) 6 Cal.2d 395, 401.

V.

Appellee Offered No Misleading or Incorrect Evidence

Counsel for appellant seeks to assign as error the fact that counsel for defendant was apparently confused as to the times at which Blake was paid his "earned wages" and repatriation bonus. This confusion was probably induced by plaintiff and his counsel, who both stated earlier that these sums had been paid *after* Blake returned to the

States (R., p. 667). In any event it was stipulated that these sums were paid prior to the settlement (R., p. 666). The time when they were paid was irrelevant. It is obvious from the portion of the record quoted at pp. 50-53 of appellant's opening brief, that plaintiff was taking the position that he thought he had signed the release in consideration for "earned wages." Counsel for defendant was seeking to bring out the fact that these wages had previously been paid. The date of payment was unimportant.

VI.

Conclusion

It is respectfully submitted that the judgment on the verdict should be affirmed.

Dated: November 18, 1948.

Respectfully submitted,

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